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THE PUBLIC LAND SYSTEM OF TEXAS, 1823-1910

BY

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PREFACE

A well-known English writer, Mr. Percy Alden, says that the history of a nation is in large measure a history of its land system. One of our own pioneer builders, Mr. James J. Hill, says: "Land without population is a wilderness, and population without land is a mob. The United States has many social, political, and economic questions—some old, some new—to settle in the near future; but none so fundamental as the true relation of the land to the national life. The first act in the progress of any civilization is to provide homes for those who desire to sit under their own vine and fig tree. A prosperous agricultural interest is to a nation what good digestion is to a man."

America has had the wilderness; whether or not it shall have the mob depends upon the intelligence and the ingenuity with which it develops its system of land tenure and encourages the growth upon the land of a large body of plain but capable and industrious rural folk. The most significant event of the nineteenth century in America was the passing of free land, the transformation of a vast body of public wealth into private property. Just as the acquisition of this spacious domain gave vigor to our industry and color to our fancy, so the generous and beneficial use of our heritage will give virility to our manhood and stability and strength to our national character.

Although the task of disposing of our public lands, especially for agricultural purposes, seems to be nearly completed, the problem of the landless man is no less serious than in any previous age. How to get a foothold on the soil is still the all-absorbing question for increasing numbers of young men, and so the nation faces a situation no less grave than that of peopling a continent and transforming a wilderness into a productive

asset. In this situation a few doubtless will say, "Let well enough alone." A few others ardently advocate the idea that the government should tax land now in the hands of private owners to the extent that they will release all that they can not profitably cultivate themselves. Many believe that the government should render the individual some assistance in the purchase of land, while a few would go so far in this direction as to establish a system of land banks that have been "saturated with government credit." Every one recognizes the importance of the attitude which the government takes toward the acquisition and ownership of land and many feel that the necessity for immediate action is imperative. It has been with the hope that the experience of Texas in disposing of its public lands would give some indication of what the future attitude of the government should be, of affording a long range point of view, so to speak, that this monograph has been prepared.

This is an historical thesis. An effort has been made faithfully to present the facts and, in the main, to let them speak for themselves. An attempt is made not only to describe the legal methods by which Texas disposed of its public lands but also to trace out the operation of these methods and to ascertain some of their social and economic effects.

It is a pleasure to acknowledge the assistance I have received in the preparation of this monograph from many of my fellow-workers, library associates and government officials. I desire particularly to express my appreciation of the encouragement and assistance I have received from Dr. Richard T. Ely who has read the entire manuscript and kindly and minutely criticised it; also from Professor Henry W. Farnam and from Professor B. H. Hibbard who have also read the manuscript and given me many valuable suggestions. Assistance from the Carnegie Institution of Washington, D. C. is also gratefully acknowledged.

Reuben McKittrick.

Cedar Falls, Iowa

April, 1917

THE PUBLIC LAND SYSTEM OF TEXAS, 1823-1910

INTRODUCTION

STATE VERSUS NATIONAL OWNERSHIP AND CONTROL OF UNOCCUPIED PUBLIC LAND

Texas is the only state ever admitted to the Union that subsequently has had complete control over the disposition of the unoccupied public land within its borders. The federal government was organized and established under the United States Constitution in 1789, and when thus organized it became the sole proprietor and "lord paramount" of the public domain. As successor to the old colonial government under the Articles of Confederation this new republic came into possession of all the public land which had been acquired under the treaty of 1783 and by virtue of the cessions from New York, Virginia, Massachusetts, Connecticut (partial), and South Carolina. As a nation, it received cessions directly from North Carolina and Georgia.¹ Since that time the United States has acquired vast tracts of public land, both by treaty and purchase. The uniform policy of the government has been to survey these lands, encourage settlement upon them, divide them into political divisions and organize a territorial form of government for each division as soon as the population had grown sufficiently to warrant such organization. Later the territory was admitted as a state at the discretion of Congress. Thus all of the states, except Texas, that have been admitted to the Union have been founded upon land belonging to the federal government, and have existed under a territorial form of government within the

¹ Donaldson, *Public Domain*, p. 59.

jurisdiction of the United States prior to their admission to the Union.

But Texas was never an integral part of the territory of the United States before it was admitted to the Union. Its colonization and development preparatory to statehood had taken place under a foreign government and it became a state in the federal union by virtue of its annexation to the United States. An agreement was made in the treaty of annexation to the effect that the state of Texas should be responsible for all public debts of the late Republic of Texas, but that it should retain all of the public lands belonging to that government.² Thus the state of Texas became the proprietor of a vast area of public land which was wholly subject to the disposition that should be made of it by the legislature.

The experience of Texas, with reference to public land, has been different from that of any other state in that the legislature has had complete control of all the public land within its borders. In other states the legislatures have had control of only such limited quantities of land as have been granted to the states by Congress for particular purposes. Under the system of congressional grants for public schools twelve states received one section for each township, and sixteen others received two. In this way California received 6,915,404 acres which is the largest number of acres that has been granted to any state. These lands have been disposed of according to the will and judgment of the California legislature, except that the proceeds were required to be applied to the funds for which the lands had been granted. In contrast to this system the Texas legislature has had complete control over and has disposed of 140,656,280 acres of land, exclusive of the 67,000,000 acres which it sold to the United States government in 1850 for \$10,000,000.

The experience of Texas in the disposition of its public lands has differed from that of other states in another respect. The state has been free to use the lands and the proceeds from them as the legislature might see fit. Other states have been free to lease or sell their public lands as the legislatures might deem expedient, but they have been bound to use the proceeds for the

² Sayles, *Early Laws of Texas*, 1: 567.

benefit of the funds for which the lands had been donated by Congress. In a few instances lands have been granted by Congress directly to the states to encourage railway building.³ Apart from these grants, states other than Texas have had no lands to dispose of, except those which have been granted for the benefit of their public schools, universities and colleges. But Texas has had immense quantities of land to use as a source of general revenue; to sell or give away in order to encourage other people to settle within its borders; to aid internal improvements; and to reserve from individual occupation and settlement in order to create an endowment for its educational system and thereby secure a greater return at a future time. All of these plans have been tried. In most instances they have been attended with some measure of success, but, generally speaking, lack of good business judgment and a representation of selfish private interests in the legislature have kept the state from realizing the largest possible benefits from its vast heritage.

GENERAL TENDENCIES IN LAND LEGISLATION

During the past century, at least prior to 1870, the general tendency of all European land legislation has been toward individual and uncontrolled ownership.⁴ Feudal tenures and communistic holdings have been broken up and cast aside. Entails and primogeniture have been abolished or greatly curtailed in many countries, and all forms of legal interference with free disposal and bequest have been so severely attacked that they have been either entirely obliterated or greatly modified. Methods of conveyance and mortgage have been intensively studied and the forms simplified until the transfer of a farm became almost as easy as the sale of a horse or a bushel of wheat. The old barriers to freedom of contract were torn away and a serious effort was put forth to make land an "object of possession, use and exchange in just the same way as a piece of furniture, a horse, money or other article of personal possession is

³ Donaldson, *Public Domain*, p. 270.

⁴ Cobden Club, *Systems of Land Tenure*; see also Cheyney, Edward P., *Recent Tendencies in the Reform in Land Tenure in Annals of the American Academy of Political and Social Science*, 2: 309-323.

at the disposal of its owner.”⁵ Landlordism and tenancy were discouraged in Ireland and England; the peasants won the contest with the landlords and the manor in France; and the great system of “rent banks” was created for the encouragement of independent ownership among the farmers of Germany.⁶ Private property in land became more highly developed; land was brought into the category of objects of personal ownership, and its transfer and free disposal were placed on the economic basis of supply and demand.

Since 1870, however, another tendency, just as distinct and just as marked, has manifested itself. In this instance the movement has been somewhat away from individual ownership and the right of free disposal. Laws have been passed in France which compel the landowner to pay an outgoing tenant an amount equal to the increase in the value in the farm due to improvements which he has made during his tenancy. Under this system, the tenant, independently of the landowner and even without his consent, is enabled to make improvements upon the land according to his own judgment and at his own discretion and to demand an indemnity for them at the expiration of his lease.⁷ This principle is said exactly to have reversed the former policy of assimilating land to other forms of property and to have introduced an element of joint double ownership instead of absolute single possession. Similar measures have been introduced into England, Scotland and Ireland, and have been seriously debated in the Belgian parliament. In Prussia a law was passed in 1890 which permitted the establishment of what are practically permanent tenancies, that are irredeemable except through the consent of both parties.

The most recent, perhaps, and certainly a most interesting experiment in the way of legislative interference with individual ownership of land, is now being tried in England under the Small Holdings and Allotments Act of 1908.⁸ This Act author-

⁵ Cheyney, *op. cit.* p. 320.

⁶ Cobden Club, *op. cit.* p. 324 *et seq.*

⁷ Cheyney, *op. cit.* pp. 320-321.

⁸ Edward 7, Ch. 36, p. 122 *et seq.* The present law of England relating to small holdings and allotments is embodied in the Act of 1908, although the principles of this legislation have been developed through a long series

izes the county councils to acquire land, by compulsory purchase if necessary, which they may sell in tracts not exceeding fifty acres for one-fifth of the purchase price in cash and small half yearly payments of the principal and interest for the balance within a term not exceeding fifty years, as may be agreed upon. The county councils are also authorized to create small tenancies on tracts of land not exceeding five acres, (1908, sec. 27), for periods of time varying from fourteen to thirty-five years, by compulsory hire, if necessary, and at a rent fixed by a public valuer. The object of these laws is "not to encourage dairy farming and market gardening," says a recent writer, but their intention is "the larger one of providing a broader stepping stone between the agricultural laborer and the tenant farmer and of thereby retaining on the land more of its best blood than heretofore."⁹ Mr. Hermann Levy also remarks¹⁰ that the framers of these laws have "created a program of agrarian reform based not simply upon the abolition of entails or on the avoidance of protective tariffs, but aiming at a positive, constructive end, namely at the creation of a new class of small cultivators."¹¹

The practice of an agriculture in the latter part of the eighteenth and the first part of the nineteenth centuries which was devoted chiefly to grain production was a very important condition, among a number of others, which resulted in an extensive absentee ownership of land in large tracts, more than half of the land in England now being owned by fewer than three thousand persons. The land also came to have a value for its sporting and its social and political advantages, so greatly in excess of its

of Acts, the most important of which are the Act of 1892, 55 and 56 Victoria, Ch. 31, and the Act of 1907, 7 Edward 7, Ch. 54. The Act of 1892, except so far as it relates to Scotland, and the Act of 1907 were repealed by the Act of 1908.

⁹ Fay, C. R., *Small Holdings and Agricultural Cooperation in England*, in *Quarterly Journal of Economics*, 24: 501, (May 1910).

¹⁰ Levy, Hermann, *Large and Small Holdings*, 1911, p. 146, translated by Ruth Kenyon from a German edition which was published under the title *Entstehung und Ruckgang des landwirtschaftlichen Grosbetriebs in England*, "with considerable additions by the author". This book treats in a splendid way the relation of the size of farms to advantageous agricultural production and the historical and practical aspects of the legislation in England designed to bring about small holdings.

¹¹ See Appendix III, a.

value for agricultural uses as practically to deprive the operating farmer of any chance to obtain a holding which would afford him a profitable occupation.¹² Large tracts of land thus became luxuries in the hands of the well-to-do rather than a means of obtaining a livelihood in the hands of industrious occupants. A diminishing agricultural population and an increasing dependence upon foreign countries for its food supply have led the English government to modify the rights of private property in land so as to readjust the size of the holding to the needs of agricultural production.¹³ "In contradistinction to the plans of communistic land reformers," however, says Mr. Levy,¹⁴ "this law refuses to limit in general the rights of property in land; it will only limit them just at the point where they oppose a development which is desirable from the purely economic point of view."¹⁵

Thus we see a distinct tendency, sometimes to create in fact a joint double ownership, but most frequently perhaps only to modify the rights of property in land so that individual ownership, rather than standing in the way of economic progress, will actually promote it.

Professor Edward P. Cheyney, of the University of Pennsylvania, in commenting upon this movement away from individual ownership, says:¹⁶

"We have apparently ceased to try to treat land exactly as other

¹² See Levy, *op. cit.*, pp. 101-124 and 200-213; an excellent account of the development of large estates in England is presented by Marriott, J. A. R., in his article, *The Concentration of Estates and the "Decay of the Yeomanry"* in *Fortnightly Review*, N. S. Vol. 94, pp. 1112-1128, 1913; see also Taylor, H. C., *The Decline of Landowning Farmers in England*, Bulletin of the University of Wisconsin, Vol. 1, No. 1, 1904.

¹³ There is a considerable body of literature which sets forth the efforts of the English people to solve their land problem as it has arisen since 1880. The following references, in addition to those already cited, are well worthy of consideration: Marriott, J. A. R., *Evolution of the English Land System*, in *Fortnightly Review*, N. S. Vol. 94, pp. 460-475, 708-722, and 1112-1128, and N. S. Vol. 95, pp. 539-553; Lincolnshire, *Rival Land Policies*, in *Nineteenth Century*, 71: 1134-1146; Parker, Sir Gilbert, *A Word for Small Ownership* in reply to Lord Lincolnshire, in *Nineteenth Century*, 72: 421-431; Jameson, T., *Hope of Small Ownership Under a New System*, in *Nineteenth Century*, 73: 156-176; Alden, Percy, *Democratic England*, pp. 238-263; and Parker, Sir Gilbert, *The Land, the People, and the State*.

¹⁴ Levy, *op. cit.* p. 145.

¹⁵ See Appendix III, b.

¹⁶ Cheyney, *op. cit.* p. 323.

forms of property. Recognizing its intrinsic peculiarities, society is struggling with the problems involved in its more just and at the same time equally productive distribution and use . . . The movement away from individualism in land owning must be considered as a general one, not confined to any particular country. It is part of the great social movement of our time, turning away from the mere freedom of the individual and seeking for a reorganization of the community, disavowing the rule of selfishness however 'enlightened', and insisting on some degree of associative action, control and enjoyment."

THE LAND SYSTEM OF THE UNITED STATES

The genesis of the land system of the United States has been traced back to the Roman Empire.¹⁷ It is said that the germ of modern public land laws is to be found in the famous Licinian laws of the Roman Republic. Many of the principles that characterize modern land legislation have been drawn from this source. First of all—the right of absolute property was a Roman idea and always foreign to Greece. The public domain (*ager publicus*) had to be defined; and when it was found that encroachments had been made, the land had to be surrendered to the state. Likewise, personal estates had to be of lawful size, and peaceful occupation was guaranteed by the state against third parties. Citizenship was an essential qualification for the enjoyment of privileges in the public lands, but every citizen was given the right to occupy public land in conformity to law. Manifestations and modifications of all these principles are to be found in the public land laws of the federal government. Even the public regulation of the size of landed estates is also exemplified in the settlement laws of the United States.

More exactly the land system of the United States may be said to have its beginning in the land cessions which were made by the seven claimant states to the national government soon after the close of the Revolutionary War for it was in this way that the public domain of the United States came into existence.¹⁸ During the colonial period of American development the title to all the lands claimed by discovery and occu-

¹⁷ Sato, Shasuke, *History of the Land Question in the United States*, Johns Hopkins University Studies, 4: 263-439.

¹⁸ Treat, Payson J., *The National Land System, 1785-1820*, pp. 1-14.

pation was vested in the Crown of England and the king was as absolutely sovereign of these territories as of his ancestral demesne. He disposed of the lands freely, however, and conveyed to his grantees such powers as seemed to him good.¹⁹ In accordance with the proprietary grants and charter privileges which the king conferred upon the colonies and colonists private titles to land in the thirteen original states emanated either directly or indirectly from the Crown of England or from the subsequent colonial and state governments²⁰ and the property rights which are involved in them are now held subject to the jurisdiction of the states in which the land is situated. In the transition from colonial to state government the English common law was made the rule of decision for all questions that were not provided for in the statutes.²¹ The common law as modified by the interpretation of American courts now obtains in all the states that have since been organized on the public domain of the United States except in Louisiana where the French Civil Code still prevails. To this limited extent it may perhaps be safe to say that the land system of the United States has been and still is being influenced by the laws and customs of the English people.

¹⁹ Palgrave, *Dictionary of Political Economy*, 2: 556.

²⁰ Palgrave's *Dictionary of Political Economy*, Vol. 2, p. 559, gives the following brief summary of the Colonial land system: "Thus, it will be seen that while in Virginia the soil was divided into large plantations varying from 200 to 20,000 acres in size, in New England it was divided into petty holdings as small as one acre or even half an acre in size. In Virginia a quit-rent was demanded; in New England the land was held in full ownership, limited only by certain liabilities to forfeiture in case of alienation or removal. As the Colonies became better established and the economic condition changed, all these restrictions on full ownership were removed. This had been done in New England by the middle of the eighteenth century, while in other colonies all proprietary rights, manorial obligations, quit-rents, forms of primogeniture, entail and intestacy escheat, were abolished in 1776. The form of freehold tenure thus defined by the different state laws and constitutions for the settled and cultivated lands, was extended by the Ordinance of 1787 to the unoccupied lands of the nation. These lands by the Peace of Paris in 1783, had ceased to be Crown lands, and, after the state cessions of 1785 to 1790, had been taken in trust by the government of the United States for the benefit of the whole people".

For a brief but good account of the colonial land system, see also Treat, *op. cit.* pp. 23-26; Bogart's *Economic History of the United States* (1913), pp. 23-26 and 48-50, may also be consulted profitably.

²¹ Hirschl, Samuel D., *Business Law*, 1915, p. iii.

In the manner specified on a preceding page the federal government acquired a property right to more than two million square miles of land outside of the thirteen original states and of the states of Kentucky²² and Texas. Practically all of this land that is desirable for purposes of economic development has since been alienated and is now in the possession of individual private holders. Titles for most of this vast domain passed directly from the federal government to the individual owners. The only exceptions to this rule were in the cases of grants comprising about 125,000,000 acres that were donated to railway and other internal improvement companies and of cessions that were made to states for the purpose of encouraging the development of certain industrial and educational institutions within their borders. Thus private titles to land throughout all the United States except in the particular states mentioned above have emanated either directly or indirectly from the federal government.

A unique feature of the land system of the United States is the fact that as soon as land has been patented by the federal government to the individual it becomes private real property and as such it is subject to local rather than national regulation; i. e., state rather than federal regulation. All the property rights incident to a title to land, such as the right to hold and enjoy, to transfer by sale or bequest, or to dispose of in any manner which best suits the owner, are held subject to the protection and control of the state governments. These property rights are also held subject to the limitations which a state may impose upon property, especially those available to a state through the exercise of its rights of eminent domain, taxation and police power. In commenting upon this point Professor Goodnow says that in spite of certain equity cases to the contrary,²³ "it cannot be denied that the law of real property is probably more thoroughly a matter of local concern than almost any other branch of the law; and it may be assumed that it will be with the greatest hesitation that the Supreme Court will ever recognize a power in

²² In reality neither Kentucky nor Tennessee was ever included in the land system of the United States. For a good account of the situation in these states see Treat, *op. cit.* pp. 8, 105-6 and 346-355.

²³ Goodnow, Frank J., *Social Reform and the Constitution*, 1910, p. 195.

Congress, should Congress ever desire to exercise it, to regulate the law of real property." This is a fact of utmost importance in so far as it has a bearing on the framing of measures intended to bring about social and economic reform, such especially as relate to irrigation service, power rights on streams, reforestation, control and use of mineral lands, and the preservation of the soil and the alienation of farm lands.

The general policy of the United States has been to dispose of its land in small quantities and practically without cost to actual settlers. Throughout the nineteenth century land was abundant and free for the pioneer farmer.²⁴ Thus the United States endeavored to distribute its public lands equitably among its citizens; to encourage individual private ownership of landed property, and thereby hasten the occupation and development of its extended and varied domain.

"In doing all this with so lavish a hand the government has been expressing the generous instincts of the government and their absorbing determination to go forth and find. For a hundred years and a little more this quest has been the drama of our life. It has given color to our civilization and buoyancy to the hearts of the people."²⁵

In the early history of the nation the public lands were looked upon as a source of income to the national treasury and efforts were made to derive a revenue from them. During this time the squatter, with his venturesome spirit and his disregard for law, was a trespasser whose activities were to be suppressed, if need be, by the military arm of the government. The revenue policy was a failure, however, and gradually the early settler emerged from his status of trespasser and violator of the laws of the Union, became, first, a sort of "estimable criminal," then an ordinary adventurer whose activities were regarded with indifference, and finally a public benefactor whose fearlessness and hardihood were looked upon as indispensable qualities in the great struggle for the conquest of a continent. Then

"It was realized by degrees that the public domain would have to be regarded as virtually free to those who were willing to go and live

²⁴ See Appendix III, c.

²⁵ Lane, Franklin K., Secretary of the Interior, *Annual Report*, 1915, p. 8.

upon it and bear their share in overcoming the difficulties of frontier life. The land laws came to be looked upon as providing a method for regularizing the occupation of the land and for settling conflicts between rival claimants, rather than as a means for putting money into the national exchequer."²⁶

The marvelous economic and social development that has taken place under this liberal land policy has served, however, to show its fallacies and indicate its weaknesses as well as to magnify its advantages. Laws that were designed for the occupation of agricultural prairie lands have been found to be ill-suited to the best use of the timber lands, and not at all adapted to suitable acquisitions of private property in land along water courses. In fact the very laws that were intended to provide land and a profitable occupation for the landless and the homeless are said to "have bred an immense amount of corruption, fostered speculation, endowed private monopoly with public wealth and pauperized whole communities."²⁷ The Public Land Commission, appointed by President Roosevelt, reported in 1905 that the federal land laws were so unsuited to their purpose that instead of promoting settlement they frequently prevented or retarded it.²⁸ But even in spite of all this if we feel that these laws have obtained as favorable results as might have been desired in encouraging economic activity and promoting settlement, still it must be conceded that they do not seem to have been well adapted to the problem of retaining the ownership of the land in the hands of the operating farmer. Scarcely has the alienation of public domain to "actual occupants of the soil" been completed, when the question of landlordism and tenancy

²⁶ Shaw, Dr. Albert, *Political Problems of American Development*, 1907, p. 87.

²⁷ Ely, Dr. Richard T., *Outlines of Economics* (1908), p. 593; for Dr. Ely's comment regarding the influence of the American and Canadian homestead laws upon economic activity and the acquisition of property by large numbers, see his *Property and Contract in Their Relation to the Distribution of Wealth* (1914), 1: 323, particularly where he says: "The land has been practically given away, or given in return for service in its development, and in comparatively small tracts; this has afforded chances to many and not allowed anyone to monopolize the land". The writer does not regard this statement as a contradiction to that quoted in the text above, but as a comment on a particular part of the land system of the United States whereas the one quoted in the text relates to the whole system.

²⁸ U. S. Public Lands Commission, *Report*, 1905, p. xlv.

looms up as one of the most portentous factors in all the great problem of rural betterment.

Uncontrolled acquisition and use of mineral lands have also been attended with serious evils. Arid districts of the West, suitable only for grazing purposes, present a problem in land-ownership in itself as distinct and as vital as the acquisition of a homestead if large landed estates and their accompanying system of landlordism and tenancy are not to be encouraged in America. The reclamation service is daily becoming a feature of increasing importance, and the necessity of public control of water courses is demanding constantly increased activity on the part of the government in order to keep them from being monopolized by private corporations and syndicates. All these problems have called for a revision of the public land system, and the pursuance of a broad policy of public use of the great national domain has started a movement toward a reversal of the old time land policy. Already more than 127,000,000 acres of timber land, an area equal to the whole of France, have been reserved from private acquisition. Likewise millions of acres of mineral lands and sources of water power have been similarly reserved.

This reversal of policy is but a part of the great movement away from individualism that was noted in a preceding section and toward a more careful use of the land as a productive factor for the benefit of the community at large. In commenting on this situation in the United States Dr. Albert Shaw says:²⁹

"All this change from the policy of private ownership to the policy of landlordism and collectivism on a great scale, in the management of the public domain, signifies no change whatever in the spirit or purpose of our American democracy. Our principle from the beginning has been a constructive one. Our government has already definitely occupied itself with the task of creating a great nationality. In the diversity of physical and climatic conditions, we have had to change our laws and administrative methods in order to achieve the building up of true American communities in the vast regions of mountain and plain and unequal rainfall extending from western Nebraska to the Sierras. The principles of democratic equality and personal initiative will not be destroyed by this new policy, but on the contrary, will be promoted and kept alive."

²⁹ *Op. cit.* p. 114.

THE SPANISH LAND SYSTEM

The history of Spanish law begins with the conquest and civilization of the Iberian peninsula by the Romans.³⁰ It is said that until the fifth century of the Christian era the rule of the Roman law in Spain was as complete as in any Roman province. During the time of the Visigothic conquest the conquerors lived by their customs and laws; and in the case of conflict, the Roman law gave way, but the Moorish conquest (711–1492) left few traces on Spanish law.

The civil law of Spain is not found in the decisions of the courts but in various compilations made by royal authority and in the commentaries of jurists. The work of compiling this great body of legal principles was begun in 1255, but it was not promulgated until 1348 and did not go into full operation until 1505 when it received the royal sanction at the Cortes in the city of Toro. The name *De Partidas* was applied to it because of its division into seven parts. It contained all of the fundamental principles of the laws of Spain. A learned writer speaking of the *Partidas* says:³¹

"We find in every page of that work the highest wisdom and the most stern justice. It gave to the monarch, under whose auspices it was executed, titles more just to the epithet of wise, bestowed upon him by his contemporaries, than his astronomical researches, however surprising the one may have been considered in an age when most studies were so much disregarded."

The system of Spanish legislation was completed in 1567 when the *Recopilacion of Castille* was published by the authority of Philip II. The government of Spanish dominions in North and South America has been conducted according to the provisions of the *Recopilacion of the Indies*, published in 1661 under the authority of Philip IV. Thus the Spanish law is a direct out-

³⁰ The statements of fact relative to the history of Spanish law that are made in this section are taken from *The New International Encyclopaedia*, first edition, 16: 42, and from Sayles, *Early Laws of Texas*, 1: 151 et seq.; see also Wooten, *op. cit.* 1: 845, for a very brief description of the Spanish Civil Law and a statement as to the extent of its application in Texas. There are no works of value in English relating to this subject except translations from *Las siete partidas*.

³¹ Quoted in Sayles, *Early Laws of Texas*, 1: 153.

growth of old Roman institutions. It is the most widely extended branch of civil law and prevails in a wider area and affects a larger population than any other system except the English.

Laws regulating certain contracts and wills were promulgated in Spain as early as 1348, but the *Partidas* fixed the rules for making wills and established the measures relating to inheritance. Many of the provisions of the *Partidas* have been abrogated or amended, but the great principles of natural law contained in it have not been changed. Feudal tenures and entails, however, were abolished at the beginning of the last century and an important law requiring the registration of conveyances and mortgages was passed in 1861. Civil marriage was introduced in 1870. To this extent Spain has had a part in and reflected the world-wide movement toward individual ownership of landed property.

THE TEXAS LAND SYSTEM

The land system of Texas had its origin in the Spanish Civil Law which was the rule of decision in Texas prior to the attainment of independence from Mexico and throughout the four succeeding years. In general the Common Law of England was substituted for the Spanish law in 1840 but certain peculiar features of the Civil Law, especially some relating to land, were still retained.³² Thus the land system of Texas has been devel-

³² By the Act of the Congress of the Republic of Texas on January 20, 1840, the Spanish Civil Law was repealed and the English Common Law was made the rule of decision with certain specific exceptions. The title and first two sections of that Act are as follows:

"An Act to adopt the common law of England, to repeal certain Mexican laws, and to regulate the marital rights of parties.

"Section 1. *Be it enacted, etc.*, That the common law of England (so far as it is not inconsistent with the constitution or the acts of Congress now in force), shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.

"Section 2. That all laws in force in this Republic prior to the first of September, 1836 (except the laws of the consulation and provisional government, now in force, and except such laws as relate exclusively to grants and the colonization of lands in the state of Coahuila and Texas, and also such laws as relate to the reservation of islands and lands, and also of the salt lakes, licks and salt springs, mines and minerals of every description, made by general and state government) be, and the same are hereby, repealed". Sayles, *Early Laws of Texas*, 1: 334.

oped under two different bodies of legal rules and is exceptionally complex because of this fact. The special difficulties in the Texas system arising from this situation are set forth by Mr. Wooten in the following terms:³³

"In those states of the American Union whose system of landed estates is derived from the feudal tenures and rules of real property of English common law comparative simplicity and similarity characterize the subject. But in Texas and those sections of the United States formerly belonging to the Latin races, and ruled by Roman law and its modified application to Spanish and French colonies in America, the study of the laws of real estate is unique and somewhat complicated. The difficulty is often enhanced, as is the case in Texas, by an anomalous blending of the two systems of jurisprudence consequent upon Anglo-American conquest, and also by a peculiar and independent system of land titles derived through special legislation in disposing of a vast extent of public domain which was reserved to the state upon its annexation to the United States."

In the account of the development of the Texas land system that is to follow and of the methods that have been adopted by the state in transferring its public lands to private owners, it will be seen that the same efforts to encourage free and uncontrolled ownership of private property in land have been made in Texas that have been manifested in all other civilized nations of the world. Land has been free to all those who would settle upon and occupy it in good faith. It has been granted and patented to the original claimants on terms that have made its alienation respond to the force of the economic principle of supply and demand, and its conveyance, either by sale, lease or bequest, has been unhampered by governmental regulation, except such simple requirements of acknowledgment and registration as are necessary to establish the validity of contracts. The restrictions to freedom of disposal that are imposed by feudal tenures, primogeniture and entail have never seriously affected land owners in Texas. Moreover, the nearest approach to the German system of long time loans on farm mortgage security, that could until recently be found in this country, is exemplified in the sale of Texas school lands on a credit of forty years at a low rate of interest. In 1910 approximately \$48,000,000 of

³³ *Op. cit.* 1: 785.

the permanent school fund, covering about 30,000,000 acres of land, was invested in land notes of this character with interest rates varying from 3 to 8 per cent.³⁴ The tendency toward restrictive legislation, however, may also be clearly seen in the recent efforts of the state to secure better returns from such small quantities of land and minerals as it still possesses. Thus, even though many defects and shortcomings in its land legislation may be and will be pointed out in succeeding pages, Texas has kept pace with the progress of the times in providing for the social well-being of its citizens.

IMPORTANCE OF THE LAND QUESTION IN TEXAS

Nearly every method or device for disposing of public land known to law, except the Georgia lottery system, has been tried in Texas. Land has been freely given to settlers; it has been exchanged directly for the services of soldiers and of a construction company formed to furnish the material and labor and erect a capitol building; it has been the basis of government credit in the issues of land scrip; it has been donated in large quantities to aid internal improvements; it has been sold outright as a direct source of revenue; and it has been set aside as an endowment for public education in order to obviate future necessities of taxation. Inasmuch as Texas is the only state in the Union, the source of whose private land titles is in the state rather than the national government, a study of its public land legislation is especially important because it shows the effect of local as compared with national government ownership and control of one of the three great agents of production. The significance of the experience of Texas is greatly enhanced by the fact that no other state has had an opportunity to deal with this question on such an extensive scale and that neither Texas itself nor any other state in the federal union will have a chance to do so again. With the exception of less than 2,000,000 acres of unsold school land which is mostly of inferior quality and which is being sold as rapidly as possible, Texas has no more public land to dispose

³⁴ Commissioner of the General Land Office, *Biennial Report*, 1910, p. 31; see also State Treasurer, *Annual Report*, 1908, p. 31.

of.³⁵ Public land legislation in Texas is, therefore, now practically at an end, but doubtless no field can elsewhere be found for years to come that will be so rich in material for economic and social investigation of the results that have attended governmental ownership and control of public lands.

The land question in Texas is also especially important because the local control and administration of the public lands within its borders has not resulted in larger industrial opportunities or better economic and social conditions among the working population of the state than prevail in other states where the control of the public land was national instead of local; in some respects, particularly among the tenant farmers, working conditions seem to be worse than they are elsewhere. In a recent state election one candidate for the nomination for governor is reported as saying that: "This (the land problem) is the biggest question in Texas," and another says: "Texas should enter upon a fixed and definite land policy which will discourage monopoly, encourage the breaking up of large holdings, and the acquisition by our good people of homes and small farms."³⁶

LIMITATIONS OF TREATMENT

The title of this monograph limits the study of the land laws of Texas to those which were enacted for the purpose of transferring public land to private owners. It, therefore, excludes from the discussion all questions of private land transfer, leases, mortgages and inheritance because these problems belong more to the domain of private than of public law. They are factors of great importance, however, in a treatment of the general land system of a state or nation. Consequently, an effort will be made in the succeeding pages to describe only those methods which have been used by the state of Texas in the disposition of its public lands and to note some of the results that have attended this legislation.

The year 1823 is chosen as the opening date because it was

³⁵ Commissioner of the General Land Office, *Annual Report*, 1914, p. 11.

³⁶ Quoted by Granbury, J. C., *The Land Problem in Texas and the Remedies Proposed*, in *The Survey*, 32: 394, 1914.

the date of Austin's contract which marks the beginning of a real effort at colonization in Texas. The year 1910 is chosen for the closing date because it corresponds to the time when public land in Texas had practically all been disposed of.

PART I—FORMATION OF THE PUBLIC DOMAIN OF TEXAS

CHAPTER I

HISTORY OF THE CHANGES IN GOVERNMENTAL AUTHORITY AND OF COLONIZATION PRIOR TO 1836

SPANISH COLONIZATION

Soon after the discovery of America the land which now comprises the state of Texas was claimed for the King of Spain by right of conquest and of occupation.¹ But this claim did not fully establish the authority of the king, for until nearly the close of the nineteenth century all newly discovered territory seems to have been regarded, in most Catholic countries, as the property of the church. The pope, as head of the church, claimed the right of property in himself to all lands, buildings and profits belonging to it and administered this property as though it were his own estate. His authority in newly discovered countries was so universally acquiesced in that the proudest sovereigns were accustomed to solicit from him the right to annex to their dominions countries which had been discovered by the enterprise of their own subjects. Ferdinand and Isabella thus obtained from Pope Alexander VI a grant to the Crown of Spain of all the tithes in the countries discovered by Columbus on condition that provision should be made for the religious instruction of the natives. Soon after this Julius II conferred on

¹ Sayles, *Real Estate Laws of Texas*, 1: 47.

Ferdinand and his successors the right of absolute disposal of all ecclesiastical benefices. These grants practically made the king of Spain the head of the Roman Catholic Church in all Spanish possessions in America and vested every species of authority in him. Thereafter conflicts between spiritual and temporal jurisdictions were unknown, and the king, independently of any foreign power, was looked upon as the source of sovereignty.² Thus by right of conquest and occupation and by virtue of its contractual relations with the pope of the Roman Catholic Church the Spanish government acquired full possession of its dominions in America and all public lands in Spanish provinces were considered the property of the Crown.

Liberal donations of land and large outlays from the royal treasury³ were made by the Spanish government in order to encourage the colonization and settlement of its American possessions in Texas. Elaborate laws were proclaimed which prescribed the mode of government for the new colonies and which set forth in minute detail the plans whereby meritorious citizens were to be given large quantities of land and were to be protected in the enjoyment of their property rights. Thus in 1523 an offer was made to distribute houses, lots and lands to all those who would settle on new land.⁴ According to this law, a distinction was made between gentlemen (*escuderos*) and laborers (*poenes*) or those of inferior merit, and the size of the grants was graduated according to the qualifications and services of the grantees. Settlers were required to build on their lots, to live in their houses, to clear and cultivate the arable lands and to stock the parts designated as pasture lands. After these obligations had been fulfilled and the settlers had lived on their land four years, they were authorized to dispose of their grants freely as their own property. Again in 1776 a new decree was issued by the king according to which he placed special officers in charge of these settlements, directed them to encourage the settlers to sow, raise and prepare flax and hemp, and authorized

² *Ibid.*, pp. 79-82.

³ Garrison, George P., *Texas*, pp. 87-88.

⁴ Sayles, *Early Laws of Texas*, 1: 17-19.

them to make a distribution of his lands, if they should deem it necessary, in order to accomplish this important object.⁵

The Spanish government endeavored to establish permanent settlements in Texas because it sincerely hoped to Christianize the Indians and establish the Catholic religion in America. In addition to this it hoped to derive a revenue from the use of its public lands. These two purposes, religious and financial, were the incentives for all its colonizing activity.⁶

The most important form of settlement was the mission which was composed principally of a small group of priests and a number of Indians who were gathered within its walls to receive instruction in the forms of the Catholic religion and in agriculture and in the commonest arts and industries. Other forms of settlement, often closely allied with the mission, were the *presidio* or the military post and the *pueblo* or civil community.

But Spanish efforts to build up permanent settlements in Texas were a failure. In all, twenty-five missions and presidios were established; but when the Anglo-Americans began to go there early in the nineteenth century, only three remained.⁷ The reason for this failure is found in the fact that the efforts of the government were directed toward establishing, supporting and protecting missions instead of developing civil communities capable of supporting and protecting themselves. Spain sent missionaries, explorers, and soldiers to Texas but never succeeded, in spite of the large inducements that were offered, in enlisting the services of the actual settler. The failure of Spanish colonization has been explained in the significant statement that Spain never either took care of the colonists or taught them how to take care of themselves.⁸

The first title to land in Texas was issued in 1731, and various large grants were made by Spanish kings from time to time until 1819. Authorities differ as to the total amount of land covered by titles issued under the laws of Spain. One writer states that such titles include about 20,000,000 acres, though another writer

⁵ *Ibid.*, pp. 37-41.

⁶ See Garrison, *op. cit.* pp. 53-66 and Sayles, *Early Laws of Texas*, 1: 30 and 37-41.

⁷ Yoakum, *History of Texas*, 1: 53-64; Garrison, *op. cit.* p. 65.

⁸ Garrison, *op. cit.* p. 99.

claims that 10,000,000 acres is, strictly speaking, all the land in Texas ever held under titles from the Spanish government.⁹ Since no record of these titles has ever been made in the Texas land office, there is no way of knowing just how many were issued or how large an amount of land was actually granted by Spanish officers.¹⁰

Large grants of land in Texas have been held under the authority of the Spanish government as "mission lands," but an absolute title to them never was issued.¹¹ These lands are said to have been held like those of a college campus. They could be used and enjoyed by the inhabitants of the mission so long as it existed, but the lands did not belong to them and could not be inherited by their descendants. If for any reason the mission should become extinct, the lands were to revert to the government. By an order of April 10, 1794, the support of the royal treasury was withdrawn from the missions and the lands were ordered to be delivered to the civil officers of Spain. The people of the missions, however, by the same decree were given titles to a part of the lands formerly held for ecclesiastical purposes. The remainder was treated as a part of the public domain and part of it was alienated in conformity with the colonization law of Coahuila and Texas.

MEXICAN COLONIZATION

Mexico, as a Spanish province, was in a state of smoldering revolution from 1810 to 1820. Various grievancees had been assigned as causes for the uprising, but the most important one was a law which gave native Spaniards privileges in Mexico superior to those of the people of that country, even to those of the people born of Spanish parents. The leaders were frequently killed or captured and the revolutionists driven into holes and corners, but in 1821 the movement was successful and Mexico became an independent nation.¹²

⁹ Sayles, *Early Laws of Texas*, 1: IX; Wooten, *Comprehensive History of Texas*, 1: 792.

¹⁰ Sayles, *Real Estate Laws of Texas*, 1: 24.

¹¹ *Ibid.*, pp. 70-79; Wooten, *op. cit.* 1: 791; see also *McMullen vs. Hodge*, 5 Texas 34 (1849) and *Trevino vs. Fernandez*, 13 Texas 630.

¹² Garrison, *op. cit.*, pp. 95-96.

The Mexican government was not permanently organized, however, until 1824. During the interim public affairs were successively in charge first of a *junta* and a regency, secondly of an imperial government with Iturbide as emperor, and thirdly of a republic at the head of which a committee composed of three persons and styled the "Supremè Executive Power" was placed. Finally in the fall of 1824 as a fourth change, the constitution of Mexico was adopted, and the government was organized as a federal republic with popular representation similar to that of the United States. In fact the United States constitution was very largely used as a model. The legislative power was given to a general congress composed of two chambers, and judicial authority was vested in a supreme court of justice and in circuit and district courts. It is important, however, to notice that the authority of the courts was limited solely to the application of the laws and did not include the power to interpret them or suspend their execution. The power of interpreting the laws and of rendering a final decision as to their application was vested exclusively in the legislative branch.¹³ This government established the Roman Catholic religion and prohibited the exercise of any other form of worship, but it did not concede the right of trial by jury.¹⁴ Thus the government of Mexico underwent four successive and independent changes during the period intervening between 1821 and 1824.

The several states in the new republic had been declared to be free, sovereign, and independent, as far as the internal administration was concerned. It is pointed out, also, very distinctly in *Fisk v. Chambers*¹⁵ that the national government of Mexico plainly and unequivocally recognized the right of the state to the vacant land within its borders, and of its right to dispose of it. The state thus being the owner of the lands could sell or donate the lands at its discretion. The state of Coahuila and Texas was organized under a provisional government as an integral part of the republic, and later adopted its own state constitution.

¹³ Sayles, *Real Estate Laws of Texas*, 1: 28 et seq.; see also *Houston vs. Robertson*, 2 Texas 1 and *Chambers vs. Fisk*, 22 Texas 504.

¹⁴ White, *Land Law in California, Oregon and Texas*, 1: 374-380.

¹⁵ 22 Texas 504

In 1821 Moses Austin, formerly a citizen of the United States, obtained a contract from the Spanish government which authorized him to establish a colony of 300 settlers in Texas, to grant lands to them, and to receive a grant of premium lands for himself as a payment for his services.¹⁶ Before the formalities of making the contract had been completed, Moses Austin died, but the work which he had begun was taken up by his son, Stephen Fuller Austin. The Spanish governor of Texas asked him to prepare a plan for the distribution of lands to the colonists. The plan which he subsequently presented in writing virtually became the principle of the later Mexican colonization laws. Austin encountered a great deal of difficulty, however, in the unsettled conditions of the government which followed the overthrow of Spanish authority in Mexico. He was compelled to visit the city of Mexico and to remain there and work his contract through all the successive changes in government outlined in the preceding paragraph until he finally secured its approval by the recognized authorities of the republic in 1824.

The members of Austin's colony finally received their lands in accordance with the colonization law of 1823.¹⁷ But since the same decree, which made this law applicable to Austin's colony, suspended it with reference to all other colonies, the new congress passed another general colonization law which merely adapted the principles of the former one to the new form of government.¹⁸ The new law expressed the purpose of the government to colonize the territories of the republic and provided a method of settlement for all those lands of the nation which were not the property of individuals, corporations or towns. It extended an invitation to foreigners to settle in the state and promised security for their persons and property, if they would subject themselves to the law of the country. In addition to this

¹⁶ For a full account of Austin's negotiations in obtaining his contract see White, *op. cit.* 1: 559-586; also translations of the various laws and decrees of Spain, Mexico and the state of Coahuila and Texas in the pages immediately following.

¹⁷ An English translation of this law may be found in White, *op. cit.* 1: 588; Sayles, *Early Laws of Texas*, 1: 42; and Gammel, *Laws of Texas*, 1: 27.

¹⁸ White, *op. cit.* 1: 601; Sayles, *Early Laws of Texas*, 1: 51; Gammel, *Laws of Texas*, 1: 38.

it offered free lands to the settlers and guaranteed the contracts which empresarios might make with families so far as they were not contrary to law. Furthermore, the imposition of any tax whatsoever upon the foreigners was prohibited for a period of four years after their entrance. The duty of making such additional laws and regulations as might be necessary to accomplish this purpose was imposed upon the various state legislatures.

Pursuant to the foregoing act, the state of Coahuila and Texas enacted a colonization law which became effective March 24, 1825.¹⁹ The state also invited foreigners to immigrate to Texas and guaranteed security to all who should do so. As a special inducement to such immigration, lands were freely offered on condition that the immigrant should present a certificate of good character, take an oath of allegiance to the Mexican government, promise to observe the Roman Catholic religion, agree to live on the land and cultivate it for a period of six years, and at the end of the six-year period pay the state a small nominal sum, proportional to the class and quantity of the land received, as an acknowledgment of the grant. The land was classified in two general grades, arable and grazing. To those families whose occupation was the cultivation of the soil, one labor (177 acres) should be given; and to those who should raise stock, enough grazing land should be added to complete a sitio or league (4,428 acres). If the raising of stock was the exclusive occupation of the family, the quantity was limited to 24,000,000 square varas (4,251 acres). Single men were entitled to receive one-fourth of the quantity allotted to a family. When they were married, their quantity would be augmented to that of a family; and if they married natives, they would receive one-fourth more. The state executive was authorized to increase the quantities thus specified in the law in proportion to the family, industry and activity of the colonists. Freedom from state taxation during a period of ten years for any purpose whatsoever, except to prevent or repel a foreign invasion, was also held out as a special inducement to colonists.

The empresario system is a method of colonization whereby the government enters into a contract with the immigration

¹⁹ White, *op. cit.* 1: 602; Sayles, *op. cit.* 1: 64; Gammel, *op. cit.* 1: 40.

agent to the effect that, if he will establish a colony of not less than a given number of persons within a definitely described territory and within a given time, it will furnish the land for these settlers on easy terms according to law and pay him for his services in premium lands. In Mexico this system had its legal basis in the colonization laws of 1823 and 1825. The plan was suggested by Austin's contract and the occasion for its adoption grew out of the economic conditions of the time. Mexico was abundantly rich in lands which had little value either from an individual or national point of view unless they were occupied and used. The government could offer large inducements to foreigners to settle upon and develop its public lands, but it had no means of publishing its offers in foreign countries or of seeking out those who might emigrate and become desirable citizens. Consequently, the law of 1825 specified that a grant of lands in the nature of a premium would be given to any man who should agree to introduce one hundred or more families at his and their own expense. The empresario or contractor was authorized to offer to all whom he might induce to immigrate the quantities of land that had been specified for other colonists. For these services the empresario would be given five sitios or leagues and five labors of land (of which one-half should be non-irrigable) for each one hundred families that he introduced and established within the state. A proportionate amount would be given for any number of families more than one hundred, but no land whatever would be given to the empresario if he failed to introduce that number of families.

The empresario thus became the advertising agent for the state. He went to foreign countries, particularly to the United States and to Germany, sought those individuals who he thought would make good settlers, and in a personal way presented the advantages and conditions of settlement which the Mexican nation had to offer. He did for the state what he otherwise might have done if it had seemed more economical to the Mexican congress to employ him merely as an agent and to pay him in cash directly out of the public treasury. The empresario system, however, was a much more efficient method of colonization than this, for it made the success or failure of the colony a

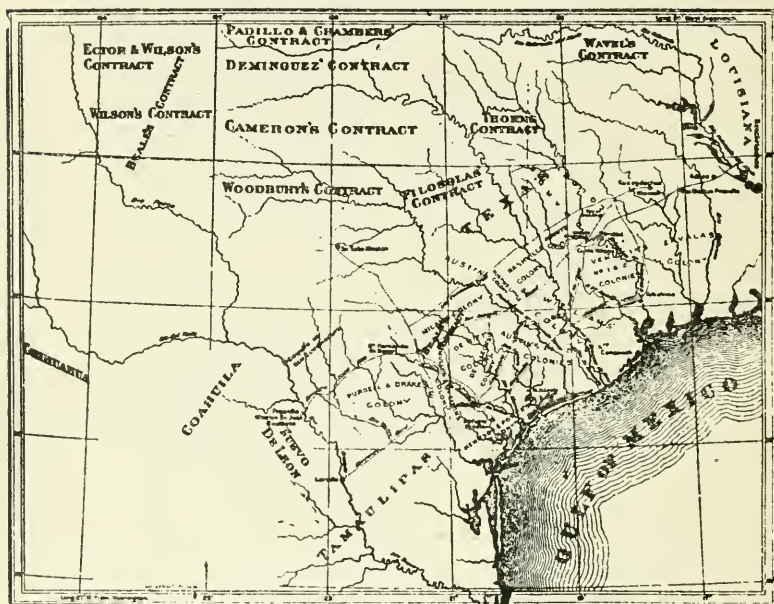
question of financial success or failure for the empresario. The return which he received for his efforts depended not only upon the number of colonists he introduced but also upon their character as well, because the value of the land which he received was directly affected by their stability and industry.

Many empresarios undertook to fulfill their contracts by personal solicitation just as Austin had done in securing the families for his colonies. Others secured grants of land and then organized immigration companies such as the German Immigration Company and the Galveston Bay and Texas Land Company. The organization of the latter company is an illustration of the way this plan was worked out. Lorenzo De Zavala, Joseph Vehlein and David G. Burnet were empresarios who held contracts for large grants in southern Texas. They, together with some large capitalists in New York and Boston, organized the Galveston Bay and Texas Land Company of which Anthony Day and George Curtis of New York City and William H. Sumner of Boston were made trustees. This corporation furnished the capital for meeting the expenses of the enterprise and relied on the increase in the value of the lands granted to the empresarios to return the capital with a fair rate of interest.²⁰ The organization thus had all the prestige and advantage of a modern corporation with its organized collective activity and its decreased individual responsibility. It is interesting to note in this connection that Zavala and Burnet later became very active and prominent men in the public affairs of Texas, Burnet having been first president of the Republic of Texas and also secretary of state during the administration of Sam Houston.

Many changes and modifications were made in the original colonization laws as outlined above, but these were only matters of detail. So far as the general principle is concerned it remained unchanged and was used later by the Republic of Texas. It is important to notice, however, the special provisions worked out in these laws which were intended to preserve an equitable distribution of property. The general law of 1824 prohibited any one from acquiring more than one league of land suitable

²⁰ Galveston Bay and Texas Land Company, *Circular* published in 1831, Document No. 10, Texas Misc. Pamphlets, Vol. 1, Wis. Historical Library.

for irrigation, four leagues of arable land without facilities for irrigation, and six leagues of grazing land; eleven leagues (48,700 acres) altogether. Empresarios might acquire more than eleven leagues as premium land, but they were required to sell all the excess within a period of twelve years, otherwise the political authorities of the state were authorized to sell such excess at auction and pay the receipts, after deducting the costs of the sale, to the former owner. Land could not be transferred in mortmain.



Courtesy of the Vernon Law Book Co., Kansas City

MAP OF SPANISH TEXAS, 1835

One other law relating to the subject of colonization which is of special significance was the Homestead Exemption law of 1829.²¹ This is probably the first law of its kind of which we have any record. It made the land of colonists and of empresarios wholly exempt from seizure for the collection of debts contracted previously to the acquisition of the land, regardless of the source from which the debts may have originated. Neither could

²¹ See Appendix III, d.

a colonist, nor an empresario be sued or discommoded in any way on account of such debts for a period of twelve years. After twelve years they might be sued, but they could not be obligated to pay in lands, implements or tools. Fruits of the land or money were the only things that could be seized for debt. The same principle was re-enacted in the laws of the Republic of Texas in 1840,²² and has been firmly fixed in Texas jurisprudence ever since.

The empresario system offered the solution for the problem of Mexican colonization. Two large grants were made in less than a month after the law was passed and one author in writing on this subject says that within seven years the whole map of Texas was plastered over, from the Sabine to the Nueces, with the claims of empresarios. The location of many of these grants is shown in the map of Spanish Texas in 1835. Of course a large number of the empresarios failed to complete their contracts, but others were eminently successful. An estimate, said to be probably quite near the truth, gives the population of Texas in 1827 as 10,000, and another in 1830 made the number 20,000 which is five times as large as the one estimated for 1821. These figures are exclusive of Indians.²³

INDEPENDENCE AND ANNEXATION OF TEXAS

The Mexican colonization laws opened the doors to the outside world and actual settlers were really going to Texas. They also afforded an opportunity for the growth on Texas soil of a civilization that was wholly different from that of Mexico and that was soon to wrest Texas from the Mexican nation. Most of these settlers came from the United States, though many came from Europe, particularly from Germany. They were men of a rugged, hardy type, full of hope and determination; and though not adventurers for the mere sake of adventure, they were by no means lacking in courage. Pioneers in the true sense, they had gone to Texas not for speculation, but to establish homes,—to be a part of and to share in the hardships as well as the bene-

²² Gammel, *op. cit.* 2: 347.

²³ Garrison, *op. cit.* pp. 155-7.

fits of this undertaking. Thus Texas was rapidly becoming the home of aggressive and industrious groups of Anglo-Americans, men generally accustomed to having a voice in all matters which concerned their immediate well-being and very much given to having their own way in the isolated Texas communities where they had been a law unto themselves during the previous decade. It was this type of citizenship with which the Mexican government came in contact when it tried more vigorously to assert its authority over the northern frontier early in the thirties. A revolution ensued, the most essential cause of which is said to have been found "in the conflict between two inharmonious varieties of civilization, independently of any accident of Mexican Policy."²⁴

At first this revolution was a struggle for the constitutional principles on which the Mexican Federal Republic was organized; later it became a contest for independence. Success in this revolution made Texas an independent nation in 1836 and it was formally recognized as such by the United States, France, Holland, Belgium and England.²⁵ Nine years later it was annexed to the United States as a state in the federal government.

Thus within a period of twenty-five years (1820-1845) Texas passed through four successive changes in governmental authority. Originally it was a Spanish province. After the Mexican revolution, it was a part of the "State of Coahuila and Texas" in the federal government of Mexico. Then it was successively an independent nation and a state in the federal government of the United States.

Upon the separation of Texas from Mexico, all the vacant domain within its borders belonging to that government became the property of Texas and subject to its control. The entire territory of Texas exceeded 350,000 square miles in area, comprising all of what is now the state of Texas, a little more than the eastern half of New Mexico, and small portions of southwestern Kansas and southeastern Colorado and southeastern

²⁴ *Ibid.*, p. 108.

²⁵ *Ibid.*, p. 252.

Wyoming.²⁶ At that time, titles had been issued to private owners by the former authorities of Spain and Mexico for only 25,517,391 acres out of this extensive domain.²⁷

²⁶ Donaldson, *Public Domain*, Map of territorial acquisitions; also in Garrison, *op. cit.*

²⁷ Commissioner of the General Land Office, *Report*, 1899, p. 5.

PART II—LEGISLATIVE DISPOSITION OF THE PUBLIC DOMAIN OF TEXAS

CHAPTER II

LAND GRANTS TO SETTLERS

PROPERTY RIGHTS AND CHANGES OF GOVERNMENT

Vested rights in property were not disturbed by any of the changes of government that have been described in the preceding chapter.¹ The separation of Texas from Mexico constituted the division of an empire, but incipient titles to land acquired under the laws of Mexico and of Coahuila and Texas, which required further action of the administrative officials of that government to complete them, still remained subject to the action of the political authorities of the new nation. The merger of the Republic of Texas into the Federal Union as a state was a peaceful revolution, effected with the consent of the people. Consequently, laws not inconsistent with the new forms of government remained unchanged and property could be acquired, held or disposed of under them just as before. In discussing the tenth section of the constitution of the Republic of Texas, which specified the quantities of land that its citizens were entitled to receive and to hold, Mr. Baker, then a member of the Congress of Texas, said:² "So far from being a repeal of the colonization laws, it is a confirmation of them, and the quantities of land granted is only an extension of the liberal spirit which induced the original passage of such laws."

¹ Sayles, *Real Estate Laws of Texas*, 1: 21.

² Baker, Mosely, chairman of the Judiciary Committee, *Report*, Nov. 16, 1836; *House Journals*, 1836-38, p. 155.

The state of Coahuila and Texas is claimed to have anticipated the success of the Texas revolution and to have indulged in a shameful and corrupt squandering of its public domain.³ Several acts were passed by the legislature of that state in 1834 and 1835 which granted eleven hundred leagues (4,870,800 acres) of land to John T. Mason, of New York, and various other individuals, some of whom lived in foreign countries. The names of Mexican servants and of fictitious persons are also said to have been inserted in the grants. The Constitutional Convention of the Republic of Texas asserted that the protection of the public domain from unjust and fraudulent claims and the quieting of the people in the enjoyment of their lands was one of its greatest duties. It, therefore, declared that all claims to land based on certain acts of the legislature of Coahuila and Texas, which it enumerated, were unlawful because they were contrary to the general colonization law of Mexico which plainly specified that not more than eleven leagues of land could be united in the hands of one individual and that a non-resident could not acquire titles to land within the Republic of Mexico.⁴

The domestic affairs of the citizens of the Republic at the time of the adoption of the constitution were in a very unsettled condition owing largely to the fact that many heads of families had not returned from the army. The framers of the constitution intended that such persons should have a fair and equal chance with those who had remained at home to select their lands, and they believed that the general welfare of the people demanded that the whole land system should be suspended. Consequently, all surveys and titles that were made or issued after the adoption of the constitution were declared to be invalid unless they were directly authorized by the constitution or by future acts of congress.⁵

Soon after the constitution of 1836 was adopted, the question arose as to what effect it would have on the Mexican colonization laws. Consequently, the Judiciary Committee of the House was asked in the fall of 1836 to report on the question of what

³ Sayles, *Real Estate Laws of Texas*, 1: 448.

⁴ Sayles, *Early Laws of Texas*, 1: 207.

⁵ *Ibid.*

laws were in force granting lands to immigrants. Mr. Baker, as chairman, reported that all the laws of Mexico and of Coahuila and Texas not contrary to the constitution were still in force and would remain so until repealed by congress; also that the committee was of the opinion that these colonization laws were not in any way repugnant to or inconsistent with the constitution.⁶ This opinion seems to have been accepted as final, although it was not at that time embodied in a statute.

The same committee was also asked to report on the question of whether or not it would be good policy to repeal or modify these laws. In answer to this question, the committee recommended that the colonization laws be repealed insofar as their future operation was concerned, but insofar as they would affect persons who had immigrated to Texas prior to the Declaration of Independence in 1836, it thought that they should not be modified.⁷ Inasmuch as there were many citizens who had acquired rights under these laws and had waited years to procure their titles, justice and sound policy, in the judgment of the committee, required that existing empresario contracts should be completed and that titles should be given to citizens resident in the country prior to March 2, 1836. The repeal of the Mexican colonization laws was brought about in the effort to establish a land system which will be set forth in subsequent paragraphs.

DEMAND FOR LAND COLONIZATION

The Republic of Texas as an independent political organization was not only financially bankrupt, but it was also seriously in need of an army and a navy to protect its frontier and to furnish the necessary police force with which to maintain order. Security of persons and property could not be guaranteed and the only way in which this bankrupt organization could command attention and hold the respect of its citizens was by means of its public lands. These it had in abundance and they were accordingly dealt out in abundance. Moreover, the free land of Texas was in competition with the public lands of the United States in Indiana, Illinois, Iowa, and Wisconsin which could be

⁶ *Baker, op. cit.*

⁷ *Ibid.*

had for the small nominal sum of \$1.25 an acre and in a country where the problems of government, both financial and military, were not such a serious matter. Herein lies the explanation for the large constitutional grants to citizens and headright grants to immigrants that were authorized in the legislation enacted prior to 1840. The disadvantages of land ownership in frontier Texas supported by a bankrupt and unstable government could be offset only by a quantity of land increased sufficiently to overcome the advantages and security of ownership of a smaller quantity in the United States. The early settlers and citizens of the Republic of Texas fully recognized the significance of this principle. And so by making it economically worth while for its own citizens to remain within its borders and support the government and by attracting in a similar way a rugged class of men to assist in extending and protecting its frontier, the Republic of Texas maintained its existence as a nation and exercised its authority as such until it was annexed to the United States and became a state in the Federal Union.

As soon, however, as Texas became an integral part of the United States and the authority of its government was extended over the new commonwealth, the land problem assumed a new aspect. New settlers were not needed so much to increase the military strength of the government and give stability to its civil functions as they were to develop its resources and make it a prosperous community from a commercial point of view. The enhancement of land values was the immediate need of the time. Every citizen of Texas in that day had an immense quantity of land at his disposal, a quantity indeed much larger than he and his family could cultivate and use profitably. A large part of his estate, therefore, was useless and practically valueless to him unless a demand could be created for it among persons outside of the borders of the state. The Republic had been truly a nation of landowners and the new commonwealth was doubtless distinguished more than any other state in the Union by the number of its citizens who were owners of private property in land. Naturally these men devised and became efficient advocates of plans which were intended to make their property more valuable to them. The results of their efforts are to be seen

throughout all the subsequent legislation which had to do with the disposition of public lands, but their most direct, immediate and perhaps most important influence is found in the aid that was rendered to internal improvement companies.

CONSTITUTIONAL GRANTS

The constitution of the Republic of Texas, which was ratified at a general election on the first Monday of September, 1836, specified that all persons who were living in Texas on the day of the Declaration of Independence (March 2, 1836) should be regarded as citizens of the Republic and should be entitled to all the accompanying privileges.⁸ Negroes and Indians were expressly excepted in this provision. Moreover, all free white persons, who, having moved to Texas and having lived there six months, would take oath that they intended to reside there permanently, and that they would support the constitution and bear true allegiance to the Republic, were declared to be entitled to all the privileges of citizenship. But all those persons who left the country in order to avoid participating in the struggle for independence, or who refused to participate in it or gave any assistance to the enemy, were declared thereby to have forfeited their rights to citizenship and to such lands as they had acquired and were holding by virtue of the Mexican colonization laws.

The constitution then specified that every citizen living in Texas who was the head of a family should be entitled to one league and one labor of land (4,605 acres) and that every single man over seventeen years of age should be entitled to one-third of a league. Those citizens who, previously to the adoption of the constitution, had received only one league according to Mexican laws, or as single men, only one-fourth of a league, were also entitled to such additional quantities as would make for them, respectively, one league and one labor or one-third of a league. After having thus defined the qualifications of citizenship and having thus specified the quantities of land to which each citizen was entitled, the constitution was very explicit in

⁸ Sayles, *Early Laws of Texas*, 1: 205.

stating that:⁹ "The citizens of the Republic shall not be compelled to reside on their land but shall have their lines plainly marked." Aliens were prohibited from holding land in the Republic except by titles emanating directly from the government. Those aliens, however, who should acquire land by direct inheritance were guaranteed a reasonable time in which to take possession of and to dispose of such land. Actual settlers and occupants of the soil were given the right in locating their land to include their improvements in preference to all other claimants.

THE CONDITIONAL CERTIFICATE PLAN

The same committee which recommended the repeal of the Mexican colonization laws, as far as their future operation was concerned, also recommended the establishment of a general land system. About six weeks later "An Act to establish a general land office for the Republic of Texas" was passed, and this law evidently contains the outline and plans of such a system.¹⁰ It was subsequently modified from time to time and its operation was even suspended, but its general principle has remained unchanged.¹¹ This act in reality repealed the Mexican colonization laws so far as they applied to immigrants who arrived after the Texas Revolution, for it provided a scheme by which public lands would be distributed to such persons.

Since the lands granted in this act were available only to those who arrived in the Republic after March 2, 1836, the law really established a system for distributing public lands to immigrants only, and the grants which it authorized may be rightly termed "Conditional Grants," for they were so designated in the statutes. Upon his arrival in the Republic, the immigrant was entitled to a "Conditional Certificate"¹² for certain quantities of land according to law; and when he had fulfilled all the conditions prescribed therein, he was given an "unconditional deed" to the land. These lands, together with those acquired

⁹ Sayles, *Early Laws of Texas*, 1: 206.

¹⁰ *Ibid.*, 1: 230-237.

¹¹ *Ibid.*, pp. 244, 249, 259-271, 296 and 456.

¹² Sayles, *Real Estate Laws of Texas*, 1: 226-8.

as constitutional grants, make up most of those that are held under what are known as "headright grants."

Any free white person who was the head of a family and who arrived in the Republic of Texas within the time specified in the law was entitled to a "conditional grant" of 1,280 acres. If the immigrant was a single man, he was entitled to 640 acres on the same terms. The conditions were that the grantee should remain and permanently reside within the Republic and do and perform all the duties required of other like citizens for a period of three years. The board of land commissioners was directed to issue to this class of claimants a certificate for their claims as soon as proof, which would show the amount of land located and the time of arrival within the Republic, was offered in the same manner as required of other claimants. Subsequent laws were passed which enabled all immigrants who arrived within the Republic before January 1, 1842, to acquire land in accordance with this method, except that the size of the tracts was reduced to 640 and 320 acres. The last of these acts modified the conditions of the grant to the extent that the claimant must reside on the land three years and cultivate at least ten acres, but even this clause was repealed February 4, 1842.¹³

Thus did the Republic of Texas freely distribute its public lands to its citizens and to its immigrants and virtually become a nation of landowners.

IMMIGRATION CONTRACTS

Although the Republic of Texas had freely given lands to all its citizens and immigrants and even offered large quantities as payment for military services,¹⁴ the government still felt the need of a larger and more thrifty population. Men, rather than lands, were what was needed in those days of conflict with Mexico and with roving bands of Indians. Texas needed active and industrious men to occupy its vacant lands and thereby make valuable those already in cultivation; the infant nation also needed fighting men to help protect its frontier settlements.

¹³ Sayles, *Early Laws of Texas*, 1: 512.

¹⁴ See Bounty and Donatlon Warrants, on page 76.

In order to get them, it sought to enlist the aid of capitalists in introducing and settling upon the vacant and unoccupied domain families and single men from other countries.¹⁵ This necessity gave rise to a great deal of legislation which authorized the President to make contracts with immigration agents and companies for the introduction of the much desired settlers. In principle this method of colonization was identically the same as that of the empresario system of Mexico and differed from it only in matters of detail. Thus it will be seen that the principle of Austin's contract, in accordance with which he sought to introduce his colony and for which he so successfully contended with all the conflicting changes in the Spanish and Mexican governments, was destined to have no little part in the colonization of the state.

By virtue of an act of 1841 the President was authorized to contract with W. S. Peters and his associates, who afterwards organized the Texas Emigration and Land Company, for the introduction of a number of families which should be specified in the contract.¹⁶ In 1842 he was authorized to make similar contracts with other companies,¹⁷ and accordingly such were made, particularly with Henry Castro, Charles F. Mercer, and the German Emigration Company. Generally speaking, the colonists were entitled to a section of land and every single man over seventeen years of age was entitled to one-half section. Each settler, however, was required to build a cabin on his land and to keep in cultivation and under good fence fifteen acres before a title could be received for it. On the other hand, the contractors were required to have the land within the designated limits of the colony surveyed into sections and half-sections of which the alternate sections were to remain the property of the Republic. In addition to this they were required to pay the expense of surveying. This expense was to be repaid to the contractor by the colonists, but a claim for it never could become a lien on their land. The contractor was also required to sup-

¹⁵ Sayles, *Real Estate Laws of Texas*, 1: 182.

¹⁶ Sayles, *Early Laws of Texas*, 1: 457.

¹⁷ *Ibid.*, p. 515.

ply each colonist with a gun and ammunition.¹⁸ He was permitted to agree to pay the expenses for the removal of the colonists to Texas in return for which a portion, not exceeding one-half, of the colonist's land might be conveyed to him. In return for their services, contractors were entitled to receive ten sections of land in the nature of a premium for every one hundred families introduced. If one-third of the entire number of colonists contracted for were not introduced within one year, the premium lands would become forfeited, but the rights of the colonists would not be thereby affected.

Other laws were subsequently passed which authorized the president to make additional contracts with W. S. Peters and his associates and to extend the time for the introduction of colonists to 1848.¹⁹ But by 1844 the tide had changed. Congress repealed all the laws authorizing the President to make colonization contracts and required him to forfeit all those that had not been strictly complied with.²⁰ President Houston vetoed this bill because he believed it impaired the obligation of existing contracts with which the Republic had no right to interfere. In his veto message he said:²¹

"The contractors for the settlement of our vacant domain have not yet had time to perfect their respective contracts, and before a fair experiment of the policy of this mode of settling the country is made, it should not be condemned. The dignity, as well as the interests of the nation, requires, as the executive believes, a strict fulfillment of all its pledges. If individuals are not protected in their just rights, it will be utterly impossible that any confidence should exist."

Regardless of his veto, however, Congress passed the bill with a constitutional majority which repealed these contract laws.

A period of litigation and special legislation began immediately after the repeal of the contract laws in which an effort was made to determine the rights of the colonists and of the contractors to lands which they claimed by virtue of these laws. Many of the contracts were forfeited either by acts of Congress or decisions of the court, but, generally speaking, rights of colon-

¹⁸ Sayles, *Real Estate Laws of Texas*, 1: 183.

¹⁹ Sayles, *Early Laws of Texas*, 1: 525.

²⁰ *Ibid.*, p. 537.

²¹ Houston, President Sam, *Veto Message*, January 10, 1844, in *Senate Journal*, p. 99.

ists were fully protected from the penalties attached to the non-compliance with the contract by the immigration agent or company which introduced them.²²

PREEMPTION CLAIMS

Preemption may be defined as a method of selling public land to actual settlers by private contract on a credit basis. A nominal minimum price for the land, together with certain conditions of residence, cultivation, and payment of the purchase price, are specified in the law. A settler is presupposed to have located on a piece of land which he believes to be vacant and which he desires to purchase in accordance with the provisions. The right of preemption, then, protects him against all other claimants in the purchase of this particular piece of land according to the terms that have been prescribed in the law. Preemption is, therefore, a private sale because it admits of no competition; the first man to occupy a piece of land subject to preemption has a preference right to buy it. The essential conditions of the contract are bona fide residence and actual cultivation. Preemption is also a credit sale because the purchase price is usually not payable until the other conditions of residence and cultivation have been fulfilled. It differs from other credit sales in that no interest is charged.

The right of preemption has also been described in the following terms:²³

"Preemption originated in the necessities of the settlers. It is not a free grant of land, but a privilege granted to a settler in purchasing a tract of land as against other competitors. It amounts simply to the

²² For citations to these laws and cases in which they have been interpreted, see Sayles, *Real Estate Laws of Texas*, 1: 181-207. In this connection the case of *Preston vs. Walsh*, 109 U. S. 297, is a very interesting and illuminating one because it contains a good review of the colonization laws of Texas and a statement of the interpretation placed upon them by the United States Supreme Court. The opinion of the Court by Justice Miller and the dissenting opinions by Justices Harlan and Field clearly set forth the controverted views. The case involved the enforcement of Mercer's contract for the establishment of a colony of immigrants in Texas. The Court held the contract to be of doubtful validity and void because of non-compliance.

²³ Sato, Shasuke, *History of the Land Question in the United States*, Johns Hopkins University Studies, 4: 417.

exclusion of competition, and the purchase of land at a minimum or a double minimum price, as the case may require."

The origin, purpose and general results of this system in the United States have been set forth in the following significant statement of the Public Land Commission.²⁴

"The preemption system was the result of law, experience, executive orders, departmental rulings and judicial construction. It has been many-phased and was applied by special acts to special localities, with peculiar or additional features, but it has always contained, even to this day, the germ of actual settlement, under which thousands of homes have been made, and lands made productive, yielding a profit in crops to the farmer and increasing resources to the nation."

Preemption never had the historical setting in Texas that it had in the United States. It was a fully developed principle of land legislation when it was first enacted in the land laws of the Republic and of the new Commonwealth. In fact the principle probably was borrowed directly from the United States, especially since the first preemption law of any importance in Texas was passed within four years after this method of disposal had been incorporated into the general land system of the federal government. The enactment of such legislation was the result of a general sentiment prevailing in Texas at that time to the effect that a law which would prevent any other mode of acquiring a right to lands than by occupancy would be a strong inducement to those who wished to cultivate their lands to settle upon them and thereby give to the frontiers, where it was most needed, additional strength.²⁵

The payment of a purchase price in the preemption system of Texas was not such an important consideration as in the United States. For the most part, lands could be acquired for fifty cents an acre. Settlement and cultivation were the central features. The adoption of the preemption and homestead principles of land settlement marked the relaxation of the government from those aggressive methods of direct colonization embodied in the laws authorizing headright grants and immigration contracts and the assumption of a more passive attitude toward this subject.

²⁴ Donaldson, *op. cit.*, p. 215.

²⁵ House Committee on Public Lands. *Report*, published in *Houston Telegraph and Texas Register*, 1839.

Within thirty days after the settler had moved upon a piece of land, he was required to file with the surveyor of the county or district in which the land was situated, a sworn written application which would designate the land that he wished to claim. The application also stated that he claimed the land for himself in good faith; that he did not own 160 acres of land in the state; that he had no other residence on land of his own; that he had actually settled upon the land which he claimed; and that he believed it to be "vacant and unappropriated" public domain. Failure to make this application would forfeit all rights to claim the land. This application served as a notice to the surveyor to survey the land and keep a record of the claim. Usually a preemptor could not claim more than 160 acres, though under the law of 1845 he might claim 320. The privilege of preemption, together with the improvements, could be sold to another actual settler and occupant. As soon as the assignee had completed the requirements of the law, he was entitled to the patent just as the original claimant would have been. When the preemptor, or his assignee, had completed a residence of three years on the land, he was required to present an affidavit to that effect from two respectable witnesses and pay such dues and fees as were required by law, whereupon a patent would be issued to him. Details of the law were changed from time to time, but the principle remained unaffected. With the exception of four years intervening February 13, 1854, and February 10, 1858, land could be acquired in Texas by right of preemption from 1845 till 1889. At the last mentioned date all preemption laws were repealed.²⁶

HOMESTEAD DONATIONS

Generally speaking, a homestead may be defined as a free grant of land to an actual settler upon the fulfillment of certain conditions of residence and cultivation. Usually the land has been surveyed by the government before it has been opened for settlement, but if not, it would be upon application. The privi-

²⁶ For a brief review of the preemption laws of Texas and citations to separate acts, see Sayles, *Real Estate Laws of Texas*, 1: 288-301.

lege of acquiring land in this way has been regarded throughout all homestead legislation in America as a civil right of every citizen who does not own land. *Bona fide* occupation and cultivation of the soil are both the essential terms of the grant and the purposes for which the grant is made. A homestead, therefore, is not a sale of land in any sense; it is an absolute donation. The principle of "commutation of homestead entries," however, is a characteristic feature of the homestead laws of the United States. This principle authorizes the settler to purchase his homestead for a nominal price at the expiration of a certain period of residence in lieu of the remaining residence requirements. Another feature of this legislation well worthy of special emphasis is the exemption of homesteads from obligation for debt contracted prior to the issuance of the patent.

The following eulogy of the Homestead Law of the United States has been made by the Public Land Commission. It is a significant statement that is worthy of repetition here because it shows the origin and purpose of this sort of legislation.²⁷

"The Homestead Act is now the approved method of acquiring title to public lands, . . . and was the outgrowth of a system extending through nearly eighty years, and now, within the circle of a hundred years since the United States acquired the first of her public lands, *the Homestead Act stands as the concentrated wisdom of legislation for the settlement of the public lands*. It protects the government; it fills the state with homes; it builds up communities and lessens the chances of social and civil disorder by giving ownership of the soil, in small tracts, to the occupants thereof. It was copied from no other nation's system. It was originally and distinctly American and remains a monument to its originators."

From an historical point of view homesteads in Texas can hardly be spoken of as the "concentrated wisdom of legislation for the settlement of public lands." The germ of the homestead donation system is found to have been established in Texas twenty-five years before the passage of the Homestead law in the United States, and it had undergone a process of enlargement and development throughout all that period before the principle was adopted as an integral part of the land system of the United States. The laws of the nation and of the state are almost identical in principle; but one probably cannot correctly

²⁷ Quoted by Sato, *op. cit.* p. 435.

be said to have been copied from the other, for each was adopted as the result of a different set of political and economic forces. Politically the Homestead law in the United States is said to be a measure that was adopted to prevent the retrocession of government lands to the states and thereby to prevent the spread of slavery; economically it is a measure that was adopted to better the conditions of free labor.²⁸ In the beginning the homestead law of Texas was a measure of expediency adopted to encourage settlement along a military road.²⁹ This was in 1838. In 1845 the scope of the law was enlarged and in 1854 a more general law was passed. Since 1866 every citizen of the state has had a constitutional right to a homestead so long as any public land remained subject to individual appropriation and settlement. Consequently the legislature was stripped of its power to repeal the homestead law, but the Supreme Court of Texas has recently held that there is no longer any vacant public land in the state subject to homestead entry.³⁰

The usual size of a homestead in Texas is 160 acres, though some homesteads of larger size have been acquired. The general conditions of the donation have been that the claimant select, locate and occupy the land for a period of three years and pay the office fees on the same. As soon as these conditions are

²⁸ Sato, *op. cit.* pp. 428-434. Even if the Homestead Act was not adopted for the avowed purpose of preventing retrocession of land to the states, it was intimately bound up with the slavery issue and its passage was successfully prevented for a long series of years by the representatives of southern states who opposed it for political reasons. Mr. John Bell Sanborn, writing in the *American Historical Review* (vol. 6, pp. 36-37), says: "The advocate of state-sovereignty and strict construction saw in the homestead act an increase in the power of the general government and therefore gave his aid to its defeat. To the Know-Nothing it was an inducement to foreigners to come to our country and bring with them subservience to the Pope. And, strongest opponent of all, the slaveholder saw that free homesteads meant the rapid settlement of the lands by the people of the North and the passing of the territories from his hands forever. He found himself defeated in the struggle for Kansas even without the homestead law to aid the Northern emigrant; with it, he saw, the North would be invincible. With all this powerful opposition is it any wonder that bills which benefited directly only a class of citizens having little political influence should have waited so long to become law?"

²⁹ For a brief review of the homestead donation laws and citations to the separate acts, see Sayles, *Real Estate Laws of Texas*, 1: 302-313.

³⁰ *Hogue vs. Baker*, 92 Texas 58, 1898.

complied with, a patent is issued. The principal differences in securing a homestead under the laws of the state and of the nation are that in the United States the settler is required to live on his land five years³¹ instead of three years as in Texas, and also that he is given greater privileges of "commutation" there than in Texas. Another distinction of no little importance is found in the fact that homesteads acquired and held under the national law are exempt from seizure for debt only so long as they have not been patented. As soon as a patent has been issued, they become subject to the homestead exemption laws of the state in which they are situated. In Texas the exemption is just the same after the issuance of the patent as before. So long as the land remains in the possession of an owner who acquired it as a homestead donation, it is exempt from all claims of private indebtedness except for work and materials used in constructing improvements when such work and materials were contracted for in writing with the consent of the wife. This principle of homestead exemption is claimed to have originated in Texas and doubtless has had a more complete development and more extended application there than in any other state in the Union.³²

³¹ Has been changed since the above was written to three years.

³² Sayles, *Civil Statutes of Texas*, 1897, 1: 936-7 and 947; see also an article on *Texas Homestead Laws* in *The Texas Review*, 1: 372-376, February, 1886.

CHAPTER III

LAND GRANTS TO INTERNAL IMPROVEMENT
COMPANIES

STATE AID TO INTERNAL IMPROVEMENTS

Soon after Texas became an integral part of the United States and as such still retained the power to dispose of the public lands within its borders, the state committed itself to the encouragement of an extensive system of internal improvements. At that time these public lands were the only means at its disposal for carrying out such an ambitious program. Consequently, they were granted in exceptionally large quantities and on easy terms to private corporations, which, in turn, agreed to construct and operate the desired improvements. In a later period of its development the state became the custodian of large funds accumulated from the sale of the lands that had been set apart for the benefit of the public schools. Then the plan was conceived of lending these funds particularly to railway companies in addition to the land grants in order to aid them in an immediate construction of the contemplated lines.¹ Thus the public lands of Texas were used directly and indirectly to stimulate a rapid and an extensive development within the state of great productive enterprises under private ownership and management.

SCOPE OF THIS LEGISLATION

The whole program for the encouragement of these internal improvements included donations of land for the construction of railways, the building of steamboats, the improvement of

¹ Sayles, *Early Laws of Texas*, 2: 378 and 419; Potts, Charles S., *Railroad Transportation in Texas* gives a good brief account of these loans, Bulletin of the University of Texas, No. 119, pp. 89-92.

rivers for navigation, the digging of canals and ditches for irrigation, the boring of artesian wells, and the erection and operation of certain manufacturing industries.² Grants of land were made at various times for all these purposes and were authorized both under general law and by special acts. In general, this legislation was prompted by legitimate motives, but a very large part of it only made possible the growth of gigantic schemes of speculation and fraud which in the end brought about an enormous waste of the public domain.

ECONOMIC DEMAND FOR SUCH ASSISTANCE

The agitation for a system of internal improvements was a concrete expression of the demand for the immediate enhancement of land values that was discussed in the preceding chapter. This demand was composed of two important elements: first, the want of a more extended market for agricultural produce which was the chief asset of this far-away state; and second, the need of a rapid growth in population within the borders of the new commonwealth. Increased transportation facilities and the establishment of new industries within the state would satisfy the first want. Moreover, the construction and operation of railways would fulfill the second one, for the railway companies would be forced as a matter of self-interest to bring immigrants into the state, not only to develop traffic for their lines but also to enable them to sell their lands which they were required to dispose of within a limited time. The demand for railway building was also particularly forceful because it was argued that in addition to the opportunities it would afford for increasing the value of lands already held by private owners the occupancy of railway lands would make the alternate sections reserved to the state, and which lay immediately adjacent to them, more desirable and valuable. The enhancement of land values, therefore, constituted an economic demand for which a system of internal improvements seemed to offer an effective means of satisfaction and to which the state responded in a most liberal and beneficent manner.

² Sayles, *op. cit.* 2: 333, 430, 546, and 556; also 3: 281, 286, 306, and 317.

EARLY AGITATION FOR LAND GRANTS TO RAILWAYS

The system of railways that was first contemplated in Texas consisted of two important parts: first, a network of intrastate roads which would afford a means of communication and transportation within the state and to the Gulf; and second, one grand trunk line extending from near Fulton, Arkansas, on the east to El Paso on the west which would eventually become a part of a continuous transeontinental railway system and which would thus make Texas tributary to a great national highway to the Pacific coast. The effort to secure and assist in the construction of this railway of "national importance" really preceded the agitation for a general plan of land donation, but it involved a long series of special legislative acts, whereas the aid rendered to the shorter roads was for the most part granted under general law.

As early as 1850 it was thought that the United States government might undertake to build a national road to the Pacific coast. By joint resolution on February 9, of that year, the Texas Legislature authorized the United States government to build such a road from some point on the Gulf of Mexico or the Mississippi River through the limits of the state.³ This resolution guaranteed a right-of-way 200 yards wide throughout the state and assured the federal government that all reasonable and proper facilities and cooperation in the construction of such a road would be extended to it. It also specified that all public lands lying within ten miles of each side of the right-of-way should be surveyed into sections of six hundred and forty acres each and that the alternate sections, in addition to the land within the right-of-way, should belong to the United States government on condition that it accept this proposition before March 4, 1851. In case the construction of the road was not undertaken or some other route selected by that time, the resolution would cease and have no effect.

The joint resolution of 1850 was the result of a general agitation throughout the South and particularly in Louisiana and Texas for a national road to the Pacific coast over a southern

³ *Ibid.*, art. 2041; Gammel, *op. cit.* 3: 589.

route.⁴ The members of the Texas Legislature believed that a large grant of land would be a strong inducement for the selection of the route and the construction of the road through their state. The report of the Senate Committee which recommended the passage of this resolution recited that it was the constitutional power and the duty of the United States government to construct such a road for commercial and military reasons.⁵ Climatic conditions, it said, favored the southern route, but the United States could not build the road without assistance. The committee argued that the donation of these lands would be a great material advantage to the state, for the road would pass through it for a distance of six hundred miles and through a portion in which most of the lands were then unappropriated and unsettled. Without the construction of this road, the public lands through which it would pass must of necessity remain nominally valueless to the state for years to come. Consequently the committee assumed that one-fourth of these lands would be worth more with the road running through them than the whole would without the road, and it asserted that it believed this assumption would not be contradicted by any one. Moreover, it was estimated that the quantity of land thus set apart for this purpose would amount to 2,560,000 acres, which, at the rate of two dollars an acre, would be equivalent to a donation to the federal government of \$5,120,000, or more than enough to pay half the cost of constructing the road through the state.

In concluding its remarks in favor of the resolution, the report of the committee says:

"What will Texas have gained if she takes this course and the road is then not made? She will have shown to her sister states of the Union that she considers the construction of this road of vital importance to the prosperity and welfare of the whole mass of the citizens

⁴ See an account in the *Texas State Gazette*, January 24, 1852, of a railroad convention at New Orleans for which the purposes are stated to be: "Not to build roads or digest charters for companies to build roads, but the aim is to consolidate and unite public opinion in the South upon a general system of railway communication, connecting and blending every portion of the South and Southwest in close harmony—a system of which New Orleans shall be the grand center."

⁵ Robertson, J. B., Chairman of the Senate Committee, *Report*, published in the *Texas State Gazette*, January 12, 1850, p. 165.

of this mighty Republic, if not to the preservation of the Union itself; and that she, having the means within herself, had the foresight and liberality to step forward and tender with a younger sister's love of the family union the means for constructing the road for more than half its length to our federal head."

No advantage was taken of this offer, however, by the national government and it therefore expired by its own limitation.

The report of the senate committee and the subsequent action on the joint resolution which it recommended doubtless are fairly representative of the attitude of the public mind toward the railway problem of 1850. The failure of the federal government to act under these circumstances could only accelerate discussion and crystallize the popular demand for substantial assistance to railway building. Consequently a convention of delegates from twenty-two counties met in Austin, November 17, 1851, to discuss the subject of railways.⁶ Among its delegates were such noted men as I. A. Paschal, O. C. Hartley, J. M. Crockett, David C. Dickinson, John W. Daney, and G. W. Paschal; men whose names are very familiar to the student of Texas politics and jurisprudence of that time. The convention remained in session ten days. The *Texas State Gazette* says that its proceedings were characterized by much spirit and that much information, statistical and otherwise, was elicited from the discussions. Judge Paschal, from the committee and in behalf of its chairman, read a lengthy and able report which proposed that the state should work out an extensive scheme of internal improvements and should furnish liberal aid to private corporations for their construction and operation. At the close of his report he offered resolutions recommending that the legislature be requested to submit the following propositions to a vote of the people: first, that \$3,000,000 be set aside as an internal improvement fund; second, that the building of railways within the state be encouraged by a loan of one-third of their cost, in installments of money as the roads progress by sections of ten miles, retaining a lien in preference to all others, in the roads, fixtures, engines, and other equipment to secure the reimbursement of the principal and interest at the rate of five per cent; third, that 5,000 acres of land scrip be issued as a bounty for

⁶ See the *Texas State Gazette*, December 6, 1851, p. 153.

each mile of every ten miles of approved road constructed in the state; and finally, that a railway running nearly through the heart of the state from the eastern to the western boundary should be encouraged by a liberal charter and donation of land. After an extended discussion, in which Messrs. Gordon, Payne, Taylor of Harrison, Neill, Paschal, Wilson, Eddy, Neighbors, Hunt and Scott participated, the resolutions were adopted and a committee of five selected to memorialize the legislature. The committee consisted of I. A. Paschal of Bexar county, George W. Smith of Jasper, L. C. Clopton of Smith, A. M. Lewis of Washington, and A. H. Marshall of Gonzales.

The session laws of 1852 do not show that the propositions set forth in the preceding paragraph were submitted to the vote of the people or that any action was taken on them during that session of the legislature. Nevertheless they were all enacted into law within the next five years though the details of their provisions were greatly modified and the assistance offered was somewhat reduced. The legislature of 1852 did charter nine railway companies, each by special act,⁷ and granted to each one eight sections of land for each mile of completed road.⁸ This sort of legislation, however, was unsatisfactory for two reasons: first, the roads were not being built and could not be built with the amount of funds which companies could obtain on eight sections of unimproved land; and second, it was special legislation,

⁷ These charters were granted to the following named companies: *Special Laws of Texas*, 1852.

1. Ch. 75, p. 68, Buffalo, Brazos & Colorado R. R. Co.
2. Ch. 109, p. 97, Henderson & Burkville R. R. Co.
3. Ch. 146, p. 130, Texas Central R. R. Co.
4. Ch. 147, p. 136, Texas & Louisiana Central R. R. Co.
5. Ch. 148, p. 142, Galveston & Red River R. R. Co., supplementary to an act March 11, 1848.
6. Ch. 152, p. 160, San Antonio Ry. Co., supplementary to Act of September 5, 1850.
7. Ch. 192, p. 183, Texas Western R. R. Co., (See also ch. 214, p. 220).
8. Ch. 195, p. 197, Vicksburg & El Paso Railroad Co.
9. Ch. 201, p. 205, Brazos & Colorado R. R. Co.

⁸ A number of companies had been chartered previous to this time. The Harrisburg & Brazos seems to have been the first one actually to have begun construction. This was in 1840. The Buffalo, Bayou, Brazos & Colorado, chartered in 1850, had completed twenty miles by August 1, 1853. This event was celebrated by a barbecue at Stafford Point. Potts, Charles S., *op cit.*, pp. 23-36.

that is, the legislature had adopted a method of creating a particular company by a separate and individual act to construct and operate a particular piece of road. Although a uniform quantity of eight sections to the mile was granted to each of these companies, such legislation did not meet the popular demand for a general system of land donations. It required that companies be organized and that application be made for a charter before any assurance could be given that the company would receive any aid from the state, whereas a general system of land donation would afford a standing offer of a definite quantity of land which would serve as an inducement for the organization of companies to construct desired lines. So the discussion and agitation went on.

After the adjournment of the legislature in 1852, a lively interest in the subject was excited and maintained throughout the state. Public meetings and conventions were held at various points and at all of them there was a decided expression of opinion in favor of some liberal and enlarged system, having for its object the connection of the various points of the state by a rapid mode of inter-communication. Finally the question became an issue in the state campaign of 1853, and members for the succeeding legislature were chosen with reference to their attitude toward this problem. Commenting editorially on the situation, the *Texas Gazette* says:⁹

"We have observed closely the announcements for the Legislature made in the various parts of the state and so far as declarations are given, every candidate yet in the field is in favor of internal improvements upon some plan or other. This is a pretty plain indication of public sentiment and bodes much good to the state, if carried out at the polls in August."

The result was the law of January 30, 1854.

THE GENERAL LAW OF 1854

The law containing the general plan of land donation as it was finally worked out was entitled, "An Act to encourage the construction of railroads in Texas by donations of land."¹⁰ It

⁹ *Texas State Gazette*, April 30, 1853.

¹⁰ Sayles, *Early Laws of Texas*, 2: 326; Gammel, *Laws of Texas*, 3: 1455.

granted to any railway company within the state sixteen sections (10,240 acres) of land for every mile of road constructed and put in running order on condition that the company complete a section of twenty-five miles or more. When the company had twenty-five miles of its road under contract and had filed a bond of \$10,000 with the state treasurer to insure the survey of the land and the completion of the contract, it might also file with the Commissioner of the General Land Office an application which described specifically the lands applied for and intended to be surveyed. Such application might apply to any portion of the public domain subject to location and entry, but it could not include more than 800 sections. The lands so designated would then be exempt from any future location, entry or preemption privilege until otherwise directed. The railway company was required to survey the land at its own expense into sections of 640 acres each and to file in the General Land Office the field notes and a map or maps on which the odd and even sections were differently colored and regularly numbered. When the road had been completed and put in running order, the Governor was directed to appoint a "skillful engineer" who should examine it, and upon his report that the road had been completed according to the law the Commissioner of the General Land Office was authorized to issue patents for the odd sections surveyed according to this act. Furthermore, the railway companies were required to sell the lands which they acquired in this manner within twelve years in the following proportions: one-fourth in six years, one-fourth in eight years, one-fourth in ten years, and the remainder by the end of the twelfth year. In later years, however, this time limit was greatly extended. The land could not be sold to any other corporation except for such purposes as might be necessary for carrying on the business of the railway. Companies thus entitled to a grant of land would forfeit their privileges unless the first section of the twenty-five miles was completed within two years after the passage of the act. The privileges would be discontinued if an additional section of the road as contemplated by the charter was not finished each year after the completion of the first twenty-five miles. The act also provided that lands could

not be donated unless the rails used should weigh at least fifty-four pounds to the yard.

Numerous changes were made in the detail of the law in subsequent years. The time for the completion of contracts was frequently extended and a large number of acts for the relief of particular companies were passed in order to prevent them from forfeiting the privileges and rights they had acquired under the act, but the general principles set forth in it were steadfastly adhered to as long as the state had any lands to donate, except for a brief period of four years, from 1869 to 1873. During this time, the law of 1854 and all of its amendments were repealed by the Constitution of 1869, and the whole donation system was thereby suspended.¹¹ In 1873 the Constitution of 1869 was amended so that the legislature was authorized to grant lands not exceeding twenty sections to the mile for the encouragement of railway building, and the principle of land donations for internal improvements was thereby re-enacted.¹² The same principle was embodied in the Constitution of 1876, (Art. XIV, sec. 3) but the legislature was restrained from granting more than sixteen sections to the mile and from making a reservation of the public domain for the purpose of satisfying such grants. The details of this legislation were elaborated in the acts of subsequent legislatures.¹³

OTHER PLANS BEFORE THE LEGISLATURE

A number of plans for using lands to encourage railway building and other internal improvements, other than the one embodied in the law of 1854, were presented to the legislature. Perhaps the most important of these was the "State Plan" which contemplated a system of internal improvements to be undertaken and conducted by the state with money raised on the sale of its bonds.¹⁴ The accruing interest on these bonds was to be paid by a direct tax on the people of the state until a

¹¹ Attorney General, *Brief in Davis vs. Gray*, 16 Wal. 203, 1872.

¹² Sayles, *Real Estate Laws of Texas*, 1: 251.

¹³ Sayles, *Early Laws of Texas*, 3: 449.

¹⁴ Throckmorton, J. W., Chairman House Committee on Internal Improvements, *Report*, House Journals, 6th Legislature, p. 405.

sufficient amount could be realized for that purpose from the sale of the public lands or from the profits on the works themselves. One of its strongest advocates was Governor E. M. Pease. The disastrous consequences that had attended similar undertakings in New York, Pennsylvania, Indiana and Illinois were used very effectively by the committee on internal improvements in the Texas Legislature to defeat this project.

Another plan no less novel than impractical, but which for a time seems to have had some strong support, was the so-called "Iron Policy."¹⁵ This scheme contemplated the setting apart of all the money, stocks, bonds and other evidences of debt or cash on hand then in the treasury and not otherwise appropriated and 75,000,000 acres of public land as a permanent school fund. The management of this property was to be entrusted to a board of internal improvement commissioners elected by the people. The land was to be sold and \$200,000,000 was to be invested in railroad iron which was to be lent to three main trunk lines. Tolls were to be charged by the companies sufficient to pay six per cent interest on the amount loaned after deducting expenses. The most essential feature of the plan, therefore, was that the state should purchase and lend to the railway companies a quantity of iron sufficient ultimately to cover 4,000 miles of road.

This bill was reported unconstitutional by the committee because it provided for the continued ownership of the iron by the state. This was in direct violation of that provision in the constitution which said: "The state shall not be a part owner in the stock or property belonging to a corporation." In general, the committee objected that this plan presented the outlines of a most stupendous combination of systems that could not be reconciled with the constitution or with the ordinary rules of prudent legislation. Consequently, it failed to obtain sufficient support to enact it into law.

EFFORTS TO SECURE A TRUNK LINE

Side by side with the general system of land donation prescribed in the law of 1854, a mass of special legislation was

¹⁵ *Ibid.*, pp. 408-9.

enacted which chartered particular companies and granted them immense tracts of land in order to obtain the construction of a continuous line across the state. Since the joint resolution of 1850 had failed to induce the federal government to locate and construct the desired trunk line, the legislature in 1853 conceived the idea of creating an enormous "Reserve" of the public lands and of inducing a private corporation by similar, though larger and more attractive, donations within this reserve, to undertake the same enterprise. This legislation gave rise to what is known as the "Mississippi and Pacific Reserve."

The act having this object in view "appropriated and set apart to any company or companies" that would undertake the construction of this road twenty sections of land for each mile of road completed and put into operation.¹⁶ It also guaranteed to such a company the right-of-way three hundred feet in width through the public lands of the state along the entire length of the road. In addition to this, it authorized the company to hold and enjoy for the uses of the road, not only for construction, but for equipment as well, all the earth, stone, timber and other material of whatsoever character and description on the public lands so long as they should remain the property of the state, except that the timber on the alternate sections reserved to the state could not be used. To satisfy any and all claims to land which might arise from the grant for this purpose, the Act reserved all the vacant and unappropriated land belonging to the state, which lay within certain designated parallels of latitude and degrees of longitude; in other words, a strip of land which extended clear across the state from east to west, the width of two degrees of latitude. This immense tract of land was not subject to location or entry by any other form of genuine land certificate until the road had been surveyed. When this had been done, the limits of the Reserve were to be withdrawn to within thirty miles on each side of the right-of-way, so that a strip of country sixty miles wide and the entire length of the proposed line would be reserved from settlement until the road was built, the land surveyed into sections, and the railway land patented according to law.

¹⁶ Sayles, *Early Laws of Texas*, 2: 386.

All locations, rights and claims to land within this reservation and under any form of genuine land certificate which had been acquired previously to the passage of the act in 1853 were not prejudiced in any way by this reservation. Any right so acquired could be perfected into a legal title in accordance with the general laws under which they had been secured.¹⁷ But when any one who had acquired such a prior right or equity to land failed to perfect it within the time and in the manner prescribed by law, he forever lost his right thereto. Efforts were made to maintain rights once acquired but subsequently lost in this way. The light in which this reservation was considered, however, from the standpoint of the state administration is well shown in the language of Chief Justice Moore of the Texas Supreme Court when he said:¹⁸

"It may be said that the law making this reservation was enacted for the benefit of a private corporation, and hence it is not a statute of which the court can take judicial notice. We think it may well be doubted whether any part of this law can be regarded as a private act, which does not come within judicial notice. Certainly portions of it, and especially that portion making the said reservation, legislates upon subjects of general interest and affects the rights of the people of the state at large, and must, therefore, be held to be public and general legislation in this particular, as much as if no private object were embraced in the law."

The act creating the Mississippi and Pacific Reserve also made it the duty of the governor to advertise in such newspapers as he might select, not exceeding twelve in number, and thus invite bids and proposals for the construction of this road. As soon as practicable thereafter he should select from the proposals so made the one which in his judgment, under all circumstances, offered the strongest assurances and guaranties that the road would be promptly and substantially built throughout its whole extent, and to enter into a contract for the construction and maintenance of a road equal at all times and in all respects to any other of the first class when thoroughly organized for business. Moreover, this contract when so entered into, was declared to be the charter of what should be known as the Miss-

¹⁷ Sayles, *Real Estate Laws of Texas*, 1: 258.

¹⁸ *Woods vs. Durrett*, 28 Texas 429, 436, 1866.

issippi and Pacific Railroad Company of which the contractors automatically became the incorporators. The charter was good for a term of ninety years and carried with it all the power, immunities, rights and privileges necessary to carry into full effect the provisions of the law.

The company thus created was authorized to form connections with other companies "for the purpose of effecting the desirable and national object of constructing a continuous and national railway from the Mississippi river to the Pacific ocean." The companies so united, by agreements properly entered into and recorded in the office of the secretary of state, were to be regarded as one corporation, with all the rights necessary to accomplish the object. The only assurance required of the incorporators was a deposit of securities to the amount of three hundred thousand dollars as a guaranty that at least fifty miles of the road would be built within eighteen months after the date of the contract.

In pursuance of these provisions a contract was entered into by the governor and a number of men who agreed to construct the Mississippi and Pacific Railroad. But the deposit offered by the contractors as required by law was not approved and the contract was declared by state officials to have been forfeited. Nevertheless, sufficient authority had been attached to it, that the Atlantic and Pacific Railroad Company, a New York corporation, by virtue of certain transfers of railway charters and stock connections which it had negotiated and established, set up a claim to 43,000,000 acres of land in Texas, and asserted that in consequence of the prior rights and locations already held by it no other company could safely proceed under the state charter.¹⁹

In the meantime the Memphis, El Paso and Pacific Railroad Company was granted a new charter in 1856 and authorized to construct the road contemplated by the Act of December 31, 1853.²⁰ Other companies had been chartered whose rights and

¹⁹ Pease, Governor E. M., *Veto Message*, Senate Journal, 6th Legislature, p. 17; see also Senate Committee on Internal Improvements, *Minority Report*, Senate Journal, 6th Legislature, pp. 101-102.

²⁰ Sayles, *Real Estate Laws of Texas*, 1: 254-5; for a brief account of the construction of this line, see also Potts, *op. cit.* pp. 32-3 and 52-3.

privileges were in apparent conflict with those of the Memphis, El Paso & Pacific Company but this road was authorized to connect with any other road chartered by the state and running in the general direction of El Paso. The subsequent barter and traffic that was carried on with these conflicting charters and overlapping reserves brought about almost endless delay in the actual construction of the road. Finally the roads of the various small companies were consolidated into the lines of the Southern Pacific Company and of the Southern Transcontinental Company, both of which were purchased by the Texas and Pacific Railroad Company in 1873.²¹ The Civil War also intervened and retarded the movement so that almost twenty-five years had passed before the desired road was actually constructed and put in operation under the management of a responsible corporation as one continuous line of railway adjusted and adapted to the needs of the traffic.²²

CONSTITUTIONALITY OF RAILWAY LAND GRANTS

The reservation for the Memphis, El Paso and Pacific Railroad Company, which was one of the companies chartered to build the much desired trunk line, lay within the old Mississippi and Pacific Reserve which was at that time intact. But a few days after granting the charter and reservation to this company, the legislature opened the Mississippi and Pacific Reserve to location and sale, and on March 1, 1857, it became subject to location the same as other public domain.²³ The commissioner of the general land office was also authorized to sell land scrip which could be located within the reserve. Moreover, the constitution of 1869 provided that all public lands which had previously been reserved for the benefit of railways or railway companies should thereafter be subject to location and survey by a genuine land certificate.²⁴ Accordingly individual land certificates covering nearly twenty thousand acres had been located in the reserve, were situated on lands claimed by the railway companies, and

²¹ Sayles, *Real Estate Laws of Texas*, 1: 254-5.

²² See also Potts, *op. cit.* pp. 32-4, 46, and 52-4.

²³ Sayles, *Early Laws of Texas*, 2: 386.

²⁴ Article X, section 8.

were about to be patented by the commissioner of the general land office.²⁵ This was the signal for a legal battle between the state and the railway companies which was finally ended by the decision in the case of *Davis v. Gray* in the United States Supreme Court.²⁶

The real question before the court was whether or not a grant of lands by the state in a charter to a railway company is a contract. The Supreme Court answered this question in the affirmative and held, therefore, that sections five and seven of the Constitution of 1869 were null and void because they were contrary to the United States Constitution which prohibits a state from passing any act that will impair the obligation of a contract.

This decision was rendered in 1872, and it made good the claims of the railway company to the lands within the reservation that had been located and surveyed in accordance with its charter. It also had the effect of repudiating all those private claims to land within the reserve that had been acquired by individuals and settlers who had believed the Act of 1856 and the Constitution of 1869 to be conclusive in regard to the rights of the railway companies. Some lands had been purchased outright from the state. Consequently, in order to make good so far as possible, the injury suffered on account of this conflicting legislation and its inability to patent these lands, the state, by legislative act, refunded the money that had been paid for them.²⁷

One good effect of this decision upon legislation relating to future land grants is found in the fact that the legislature was eventually prohibited by constitutional enactment from making any reservation of the public domain to satisfy grants of land for the purpose of encouraging the construction of railways and internal improvements.²⁸ It did not, however, cause any immediate suspension of indulgence in the land grant system as a means of encouraging such undertakings. In 1873, the year following the announcement of this decision, the people of the state rati-

²⁵ Sayles, *Real Estate Laws of Texas*, 1: 261.

²⁶ 16 Wal. 203, 1872.

²⁷ Sayles, *Early Laws of Texas*, 3: 387.

²⁸ *Civil Statutes*, 1895, p. 573.

fied an amendment to that section of the Constitution which had repealed the land donation system of 1854.²⁹

Thereafter the legislature had full authority to grant lands for railways not exceeding twenty sections to the mile. With the constitutional obstacle out of the way, the International and Great Northern Railroad Company was soon incorporated by special act and granted twenty sections of land for each mile of road constructed without the accompanying obligation to survey and select the land in alternate sections.³⁰

In addition to this magnificent land donation which enabled the company to locate "straight certificates" for 3,331,200 acres, its capital stock, rights, franchises, rolling stock and all other physical property, including the land, was exempted from all state, county, town, city, municipal and other taxes for a period of twenty-five years, except county and municipal taxes in counties and municipalities which had donated bonds to aid the construction of the road. The Constitution of 1876 permitted the legislature to grant not more than sixteen sections to the mile in alternate sections, and accordingly a bill was passed at the succeeding session which embodied this principle.³¹

REPEAL OF THE LAND GRANT SYSTEM

This legislation remained on the statute books until 1882 when the whole land donation system was repealed³² because it was thought that the public domain was being disposed of so rapidly that soon there would not be enough left to satisfy existing claims. In fact the state had already issued certificates for nearly 8,000,000 acres more than it possessed.³³ This was the end of a long period of legislation covering more than thirty years during which the state endeavored by positive enactments to favor the development of its one great natural resource through the activity of private corporations. It also marked the approach of a time when the attitude of the state toward cor-

²⁹ *Civil Statutes*, 1895, p. 476.

³⁰ *Special Laws of Texas*, 1875, p. 69.

³¹ Sayles, *Early Laws of Texas*, 3: 449.

³² *Civil Statutes*, p. 457.

³³ Potts, *op. cit.* p. 101.

porate activity was completely reversed and regarded by business men outside its limits as decidedly antagonistic rather than favorable to private corporations engaged in industrial and commercial enterprises.³⁴

PROGRESS OF RAILWAY DEVELOPMENT IN TEXAS

Railways were regarded, especially during the early period of their development in Texas, as an indispensable medium through which commerce could be carried on, and it was said that their influence in appreciating the value of real estate would extend to almost inaccessible and unproductive regions. Consequently the state chartered thirty-eight different companies in less than five years which had a projected mileage of more than 7,500 miles and which had been enabled by means of their charters and the railway laws then in existence to acquire and to hold an incumbrance on the public domain amounting to more than 77,080,720 acres. Fewer than one hundred miles of road had been constructed, however, by the end of that period (1858).³⁵ Nearly one-half of this incumbrance upon the public lands was forfeited because the greater number, at least a very large number, of these companies were chartered only for the purposes of speculation and were never able to complete their projected lines and patent their lands. But even with such magnificent donations of land as security for the investment of capital, the companies had actually constructed but very little more than 500 miles of road by 1870, nearly twenty years after the time when the land grants were first made to insure the building of

³⁴ Merchants Association of New York, *The Natural Resources and Economic Conditions of the State of Texas*, 1901, p. 81.

³⁵ Runnels, Governor H. R., *Annual Message*, December 27, 1858. The foregoing figures are taken from this message and are given merely as the statement of Governor Runnels representing an official point of view at that time. Mr. Potts makes the following statement for the entire period prior to the Civil War, (*op. cit.* p. 34): "Beginning with the Texas Railroad Navigation and Banking Company in 1836, the Legislature had by special act incorporated more than fifty railroad companies and authorized the construction of many thousands of miles of line". There is also some disagreement as to the total number of miles of line completed in 1858, 205 being the number given by Mr. Potts as compared with fewer than 100 cited above.

these railways. This was equivalent to about one mile of railway for every 540 square miles of territory in the state.³⁶

The total mileage exceeded 8,700 miles, however, in 1890, and this was a ratio of one mile of railway to thirty-two square miles of territory. More than 13,000 miles had been completed by 1910 and the ratio had risen to about one to twenty.³⁷ Not nearly all this mileage was built as a result of land grants, but a great deal is due to the impetus of the land grant system. On the whole, sixty-seven companies had been chartered prior to 1882, of which only nineteen constructed their roads and only twelve finally received lands.³⁸ A total of 38,800,000 acres was patented to these companies, but a large amount of this land has since been recovered so that at the present time approximately 32,400,000 acres is all that has been received by railway companies.³⁹ This acreage includes more than 38,000 square miles, an area larger than the state of Indiana.

In spite of the imposition and fraud that was practiced upon the state, the policy of granting land to railway companies was a judicious and an economic one. With no roads whatever in the state when it was adopted, and with 6,000 miles in operation when it was abandoned at the end of thirty years,⁴⁰ the stimulus which it gave to activity along this line is unquestionable. If the laws in which it was expressed had been wisely enacted and skillfully executed, the state would have profited greatly by its operation. Regardless of its defects and disappointments, this system ultimately brought about a period of railway building probably excelled in no other state or country;⁴¹ made possible a most phenomenal growth in agriculture by supplying the necessary transportation facilities, and secured for the state in the railway corporations the most efficient of its colonizing agencies. It also secured the survey of a part of the public domain equal in quantity to that donated to the companies. This advantage, however, was not so beneficial as it seemed, for considerably more

³⁶ Potts, *op. cit.* p. 40.

³⁷ *Ibid.*, p. 44.

³⁸ *Ibid.*, p. 101.

³⁹ Robison, J. T., Commissioner of the General Land Office, *Biennial Report*, 1910, p. 29.

⁴⁰ Potts, *op. cit.* p. 43.

⁴¹ see Appendix III, e.

than 9,000,000 acres have had to be resurveyed, at a cost to settlers far in excess of \$200,000, in order to quiet the "trouble and turmoil" resulting from the uncertainty of the former surveys made by the railway companies.⁴² Nevertheless, the land grant system was a great disappointment, and in many ways, a complete failure because it did not materially assist in conducting the traffic or in enhancing the land values during the two decades for which it was originally designed. This is a matter of utmost significance for it is evident that with only 500 miles of road actually completed and in operation at the end of twenty years the immediate benefits that were expected to be derived from the land grant system were practically all deferred until the next generation.

At the time the federal government adopted the policy of granting public land to encourage railway building, hopes and expectations were entertained throughout the whole nation similar to those in Texas. Railways were looked upon as a means of greatly appreciating the value of the public lands, and accordingly, 155,904,994 acres were granted to accomplish this purpose.⁴³ Quick construction was an essential condition for the success of such a policy, for delay in the building of a road might entirely change the situation and remove the necessity for it. In this respect the land grant system in the United States was also a disappointment, for a careful estimate which has been made shows that probably not more than one-half of the 7,445 miles of such contemplated roads were constructed and put into operation within the time specified in the statutes.⁴⁴ The Texas system suffered a good deal in comparison with this situation, however, on account of the fact that the total mileage of projected lines for which the state had issued charters equalled that of the United States; whereas less than one-seventy-fifth of this mileage had been constructed at the end of five years and

⁴² Potts, *op. cit.* p. 104.

⁴³ Donaldson, *Public Domain*, p. 273; approximately 116,000,000 acres of this magnificent donation have been patented up to the present time. Commissioner of the U. S. Land Office, Annual Report, 1914, pp. 53-55.

⁴⁴ Sanborn, John Bell, *Congressional Land Grants in Aid of Railways*, Bulletin of the University of Wisconsin, No. 30, p. 82.

but a little over one-fifteenth of it had been completed at the end of the twentieth year after the land grants were first made.

Many influences and circumstances doubtless are responsible for the retarded development of railway building in Texas during the land grant period. The Civil War with its attendant financial stringency obviously was a most potent factor in the dilatory progress which was made. "Reckless legislation" was another factor of no mean importance and, from the standpoint of this study, one which merits further consideration.

The legislature seems to have committed itself to the granting of charters indiscriminately and wholly without reference to locality, usefulness or any guarantee of compliance. The whole map of the state was plastered over with charts of the projected lines and the whole community was thoroughly canvassed to find suitable names to fill up the list of incorporators.⁴⁵ The fault lay, not in the corporate system, but in its abuse. Had charters been granted only to companies for whose lines there was, at least, an apparent need, and had the legislature been careful to avoid granting conflicting and overlapping charters, doubtless the land donated would have been sufficient in quantity and value to have secured the construction of such roads as would have supplied a public necessity. Had the problem been handled as a strictly business proposition between individuals or private corporations would have been, the equivalent of such an offer surely would have produced concrete results long before the expiration of twenty years. But when applications were the sole reason for granting charters for which not a dollar of cash or corporate securities was required as an assurance of good faith, and when electioneering purposes, personal ambition and individual cupidity were controlling motives in the disposition of public property, little more could be expected. Such, however, were the elements which entered into the improvident legislation that characterized the decade of the fifties. The corporate system with liberal donations of land should have been good public economy, but from the standpoint

⁴⁵ Runnels, Governor H. R., *Annual Message*, December 27, 1858. This is an unusual message. A copy of it may be found in a bound volume of printed messages in the State Library at Austin, Texas.

of state activity the explanation for its failure is directly attributable to the legislature, the members of which, some on account of a lack of foresight and business ability and others on account of selfish private interests, in face of the advice and in opposition to the counsel of the administrative officers, gave legal status to the designs of speculators and impostors.⁴⁶

In this respect the legislative and administrative officers of Texas have probably been no worse, nor very little better, than similar officers of other states. The defect seems to the writer to be one of system rather than of personnel. The more one studies the efforts of state legislatures, during the nineteenth century, to deal with the problems of internal improvements and of disposing of the school lands ceded to the states by the federal government,⁴⁷ the deeper the conviction becomes that their capacity for dealing with business problems of this nature was extremely meager.

LAND GRANTS TO OTHER INTERNAL IMPROVEMENT COMPANIES

Thus far the accounts of the donations to aid railway building have quite overshadowed similar donations for other internal improvement purposes; but such donations are not altogether to be lost sight of. The state in its generosity and enthusiasm for rapid economic development appropriated no less than four and one-half million acres⁴⁸ to assist such struggling enterprises as the construction of steamboats and other sea-going vessels, the dredging and improvement of the Sabine, Neches, Angelina, Gaudalupe, San Antonio, and other rivers, the digging of canal and irrigation ditches, the boring of artesian wells, the construction of plank and macadam roads, and for the erection of "new and efficient machinery for the manufacture of iron from ore, or for the manufacture of cotton or wool into thread or cloth, or for the manufacture of firearms, nitre, sulphur, powder, salt, cotton, or woolen cards and spinning jennies, or paper

⁴⁶ See also veto messages in the *Journals* of the 6th and 7th Legislatures.

⁴⁷ On the management of permanent public school funds and losses to the same see Swift, *Public Permanent Common School Funds in the United States, 1795-1905*, Chs. 5 and 6.

⁴⁸ Robison, J. T., Commissioner of the General Land Office, *Biennial Report*, 1910, p. 30.

and oil.’’⁴⁹ Truly this was an ambitious program. That the results obtained from so broad an endeavor did not meet the expectations of those who were obliged to bear the burden of supporting it is not at all surprising. The dredging and improving of many “so-called rivers whose pretensions to being navigable streams enabled them to prey upon the State,” and the digging of “canals and ditches for navigation and irrigation, leading nowhere and benefiting nobody,” says Mr. Dudley G. Wooten,⁵⁰ one of Texas’ most able historians, “furnishes a chapter of folly in the history of our land system, that is all the more deplorable as having been written under a political administration whose boast it was to have reversed the extravagant and improvident policies of former years.” Unless history is to repeat itself, though on a larger scale, and the recent “pork barrel” agitation is to be of no avail, the nation may well consider the experience of Texas in generously donating public funds for local developmental projects.

⁴⁹ Sayles, *Real Estate Laws of Texas*, 1: 270-3.

⁵⁰ Wooten, *op. cit.* 1: 834.

CHAPTER IV

PUBLIC LANDS AS A SOURCE OF REVENUE

PUBLIC LANDS AND REVENUE IN THE UNITED STATES

The public lands of the United States, especially during the early periods of its history, were regarded as a source of revenue and many laws were passed having that object in view.¹ But it is doubtful whether as a revenue producer the national land system has been very successful, for the "revenue theory of management clashed with the needs of the actual settler" and very frequently the settler had a noteworthy advantage in such a contest. It is true that the federal government derived a considerable sum of money from the proceeds of its land sales, especially so during the early period of our national history.² Nevertheless the opinion prevails among many writers on this subject that the public lands have cost the government more for their purchase and administration than has been obtained from their sale and lease. Even after one hundred and twenty-five years of possession and control the government accounts show a balance of only about \$70,000,000 in favor of receipts, the expenses for war and exploration being excluded. In recent years very little effort has been put forth to derive any income from them except in the way of certain office fees for surveys and patents.

As soon as the public lands of the United States were patented to individual owners, they became the personal property of such owners and were subject to taxation by the states in which they

¹ An excellent and comprehensive discussion of the revenue aspects of the United States land system is presented in a recent book by Treat, Payson J., *The National Land System, 1785-1820*; see also, Sato, *op. cit.* pp. 385-6.

² See Appendix III, f.

were situated. But the power to tax land in the possession of private holders does not extend to the federal government. Consequently, the income derived from the sale or lease of these lands before they were patented is, strictly speaking, all that the nation received from them in the way of direct revenue.

RELATION OF PUBLIC LANDS TO REVENUE IN TEXAS

The income derived from the public lands of Texas, however, has far exceeded their cost of administration. Estimated conservatively, the state now has permanent funds amounting to approximately \$100,000,000 that have been derived from its public lands. In addition to these, it has obtained many millions more in a transfer to the United States, in sales to private owners, in the erection of its capital building, in its bounty and donation warrants, and in the survey of a quantity equal to that granted to railway companies. Owing to the incompleteness of records, an accurate statement of just what the net proceeds of the public lands have been cannot be made at this time. Large as the net gain may seem to be, however, it is far short of what should have been derived from this vast area by judicious management.

As soon as the public lands of Texas have been patented to private owners, the state, unlike the federal government, has been able to tax them. Thus, irrespective of what may have or what ought to have been derived from them before they were patented they have been a constant and never-failing source of income to the state ever since. This fact has had no little influence in bringing about that exceptionally liberal and often improvident disposition of these lands which has caused the state to forego a large portion of the income that might have been obtained from them before they were patented.

BOUNTY AND DONATION WARRANTS

One of the serious problems which confronted the Republic of Texas was the maintenance of an army.³ Even though the Mexican forces had been completely routed in the battle of San

³ Garrison, *op. cit.* p. 231, *et seq.*

Jacinto and the independence of the Republic was an established fact, the infant nation was, nevertheless, in constant peril of subsequent Mexican invasions. Moreover, the Indians were particularly hostile because they thought the whites were too aggressive. In addition to this, they were incessantly encouraged in their ravages and depredations upon the Texas frontier by the secret agents of the Mexican government. Consequently an army had to be maintained to repel a possible invasion and to protect the frontier. But the nation had no way of supporting such an army, except as it might be able to exchange a portion of its public domain for services of soldiers and to supply their equipment from income derived from the sale of other portions of the public domain or credit based upon it. In later years when it was felt that these soldiers should be more liberally cared for, the state was able to render them more substantial assistance by donations from its public lands as pensions than in any other way. Thus, large quantities of public land in Texas have been granted to soldiers under what are known as bounty and donation warrants.

Bounty and donation warrants were certificates of land issued to soldiers, or to families of deceased soldiers, of the Republic and of the state of Texas. Usually they were given as a payment for services or as pensions, but some were issued to the heirs of those who fell in the Alamo as a gift in whom title vested absolutely⁴ and others were issued to soldiers who had been permanently injured and rendered incapable of bodily labor, as a testimony of the gratitude of the Republic.⁵ Generally speaking, these certificates could be located on any of the vacant and unappropriated public domain, just as headright certificates. The quantities of land designated in them varied usually from 160 to 1280 acres, according to the time, purposes and circumstances under which the grant was made. Thus, in the early history of the republic when it was desirable to obtain volunteers from the United States, the quantity of land was graduated according to the period of service as follows: All those who had served three months were entitled to 320 acres;

⁴ Sayles, *Real Estate Laws of Texas*, 1: 210.

⁵ *Ibid.*, p. 211.

six months, 640 acres; nine months, 960 acres; and twelve months or more, 1280 acres.⁶ In 1881 a grant of 1,280 acres was made to all confederate soldiers living within the state, or to the widows of those confederate soldiers who had been killed during the Civil War.⁷

An exact statement of the number of acres patented as bounty lands and donations to soldiers and their families cannot be given because separate accounts of this nature have not been kept in the general land office. But the use of a part of the public domain for this purpose, as a matter of public policy, was a good one. The effect of the offer in 1837 was almost immediate, and soon the number in the army rose to more than 2,000 men, most of whom came from the United States.⁸ Moreover, a grant of public lands to those who had rendered military aid to the nation and the state and to their families, either as a payment for services or as a pension, was even better than a payment in money because the government thereby retained the later residence and support of these loyal men in a civil capacity. If the state lost anything in the issuance of its bounty and donation warrants, the loss was due to inefficient administration and the inability of its administrative officers to distinguish between valid and fraudulent warrants. In fact, a select committee of the Senate reported in 1856 that 97,560 acres of land were fraudulently claimed under this form of land certificate.⁹

THE CAPITOL LANDS

The so-called "capitol lands" consist of 3,000,000 acres that were set apart by the constitution of 1876 to secure the erection of a capitol building.¹⁰ In accordance with the statutes which were afterwards enacted, these lands were located in the extreme northwestern corner of the state and were surveyed into sections of 640 acres each.¹¹ A "complete and perfect title" for

⁶ Sayles, *Early Laws of Texas*, 1: 252.

⁷ *Civil Statutes*, 2: 319.

⁸ Garrison, *op. cit.* p. 231.

⁹ Select Committee of the Senate, *Report*, Senate Journal, 1856, p. 387.

¹⁰ *Constitution of 1876*, art. XVI, sec. 57.

¹¹ *Laws of Texas*, 1879, p. 9.

them was given to a syndicate in exchange for the furnishing of material and labor and the erection of the present capitol building according to the terms of the contract entered into by the Capitol Building Commission and Mathias Schnell of Rock Island, Illinois.¹² The transfer of the lands was made in thirty-five installments as the work progressed.

A committee of the state officials valued these lands at \$1,500,000 before the advertisement for bids was published. Evidence that this estimate was quite near the real value of the lands at that time is found in the fact that 50,000 acres immediately adjacent to them were sold at public auction at the rate of fifty-five cents an acre by the same officials in order to meet the cost of surveying the entire tract. In return for these lands the state secured the erection of a capitol building that actually cost in labor and material \$3,744,630.60.¹³ In addition to this, it has had the use of one of the finest and most commodious capitol buildings in the United States for more than twenty years. At the same time it obtained some very effective advertising of the real value of its lands and building materials through the publication and discussion of this offer in the eastern and northern parts of the United States and Europe.

The land that was granted for this purpose is still held by a syndicate and is, for the most part, used for cattle ranches, just as is the surrounding country. The state, however, cannot be said to have suffered from the presence of a land monopoly due solely to this transaction, for nearly all the land in the adjoining counties has also been in the control of large cattle companies. But these are fast disappearing and simultaneously with their disappearance, the syndicate is said to be preparing to dispose of its land to small holders.

LAND SCRIP

Throughout the early years of the existence of the Republic of Texas, the public finances were in a most deplorable and em-

¹² For a copy of the contract see Capitol Building Commission, *Report*, 1883, p. 96.

¹³ *Ibid.*, *Final Report*, 1888, p. 3.

barrassing condition.¹⁴ President Houston says that during the first year of his administration there was less than \$500 of actual cash in the treasury.¹⁵ Moreover, an army had been enlisted through the liberal offers of land as payment for military services. Money had to be raised in order to provide equipment and subsistence, otherwise the army would have been left destitute. Such a condition of affairs, it was feared, would bring about anarchy and dissolution. The credit of the government was insufficient at this time to supply these funds on any kind of reasonable terms, and therefore, officials of the government were forced to dispose of the public land in order to meet this public exigency. The idea of selling the land was not resorted to, however, until after the government had apparently exhausted all other possibilities of raising money. In December, 1835, a million dollar loan was authorized and B. T. Archer, W. H. Wharton, and Stephen F. Austin were sent as commissioners to the United States to negotiate the loan. They were instructed "to pledge or hypothecate the public lands of Texas, and to pledge the public faith" as security for such a loan.

Early in 1836 these commissioners negotiated a loan of \$200,000 with Thos. D. Carneal and others, but the efforts of the government to secure its release from the terms of this contract which it believed to be intolerable were unsuccessful¹⁶ and turned the weight of public opinion, for the time being, against the plan of raising money for the government by means of an ordinary loan. The objection to the contract just mentioned was that land to be selected from any part of the public domain might be taken at the rate of fifty cents an acre in payment for the debt. The contract provided that the government of Texas could not make any other grant or sale of lands thereafter which did not contain a reservation of priority of location for the lands specified in the contract until after the debt was paid.¹⁷ This

¹⁴ Yoakum, *History of Texas*, 2: 189, 243, 285 and 379.

¹⁵ Houston, President Sam, *Annual Message*, 1837, House Journal, Special Session, p. 153.

¹⁶ Sayles, *Real Estate Laws of Texas*, 1: 219; Burnet, President, *Annual Message*, October 4, House Journal, 1836-1838, p. 14.

¹⁷ In *Franklin v. Kessler*, 25 Texas 138, (1860), the court held, however, that the president had no authority to attach any conditions whatever to land scrip, much less that such scrip should deprive the government of the

arrangement apparently constituted an exclusive privilege by which the creditors of the state could locate their lands in preference to all other claimants except that vested rights to property in land then existing could not be disturbed. This privilege was the objectionable feature of the whole plan, and although \$20,000 had already been received from the proceeds of the loan the government refused to ratify the contract.¹⁸ The result of the negotiation afforded conclusive evidence of the impracticability of anticipating the wants of the country, by means of loans.¹⁹ Some other course was necessary and the government resolved to issue scrip for land,²⁰ considering the "*public domain as the most available and the least objectionable source of public revenue.*"²¹ Such were the conditions which first brought about the issuance of land scrip in Texas.

Land scrip was an evidence of debt against the state which was payable in public land at a specified rate according to the terms of the law which authorized its issue. In reality the issuance of land scrip was only a method of selling public land or of transferring it to those who held claims against the government as a settlement of their accounts. Frequently, though not always, the debt had been contracted before the issuance of the land scrip was authorized. This statement is true more notably for the early history of the Republic and state than later when the state sold land scrip outright and permitted the purchaser to locate it at his own convenience. Most land scrip was issued in certificates of 160, 320 and 640 acres, though there were some for even as much as 1,280 acres and at a rate

right to reserve from location any portion of the public domain, as the policy or exigencies of the Republic might demand.

¹⁸ For a brief but good account of this whole transaction see an article by Barker, E. C., *The Finances of the Texas Revolution*, in *Political Science Quarterly*, 19: 612-635, 1904.

¹⁹ In reality this loan, if it had been completed as it was contemplated, probably would have resolved itself into a mere sale of the public lands, for the lenders appear to have decided to take lands in payment for their loan even before they advanced any money on the contract. Barker says that to them "it was a gigantic land speculation" and that they "bound themselves by mutual agreement not to sell to any outsiders for less than \$1.25 an acre and began forthwith to boom Texas lands both by letter and in the public prints." *Op. cit.* p. 631.

²⁰ Resolution of December 6, 1836, Sayles, *Early Laws of Texas*, 1: 210.

²¹ Burnet, President David, *Message to Congress*, 1836, House Journal, p. 14.

varying from fifty cents to \$2 an acre. These certificates were an evidence of a right to land to be selected out of the vacant, unappropriated public domain²² and when such selection was made by a location of the certificate, the right of the holder attached immediately to such land. They were transferable and the assignee was entitled to the same rights and privileges of location, survey and patent as the original holder. As a general rule, land scrip could be located and the land surveyed and patented in the same manner as other certificates for land, except that no certificate for land scrip could be located on salt springs, gold or silver mines, copper, lead or other minerals, or on any island of the Republic. In nearly all the early issues of scrip, the certificates could be held by aliens and the land patented to them. Later on, the issues were restricted to citizens of the Republic. The early issues of scrip did not carry with them any obligation of residence on the land or any penalty of forfeiture for failure to make improvements. The later issues, however, were sold only to actual settlers. The constitutions of 1869 and 1876 both contained sections forbidding the legislature to make further issues of land scrip, except on this condition.²³

Land scrip was usually issued only at times when it was thought better to obtain money in this way than to issue bonds. It was, therefore, simply one way of expanding the credit of the government. The system, however, was open to abuse, especially when first adopted, because the certificates were poorly engraved and easily counterfeited. The issuance of certificates of similar form to soldiers under the bounty and donation laws, which passed as land scrip, also detracted from the efficiency of the system. The soldiers frequently being destitute, sold

²² In *State v. Delesdenier*, 7 Texas 76, (1851), for instance, it was held that the scrip issued to William Bryan gave the holder no claim to any particular portion of the public lands but a general lien upon all the lands to be satisfied out of such portions as were unappropriated at the time he made his selection and location.

²³ There have been a large number of acts passed in Texas relative to land scrip. The more important ones will be found by reference to the following citations: Sayles, *Early Laws of Texas*, 1: 210, 211, 224, 235, 238, 257, 283, 472 and 576; also 2: 254, 321, 452, 510 and 532. For constitutional provisions see *Civil Statutes*, 4: pp. 444 and 573; see also Sayles, *Real Estate Laws of Texas*, 1: 219-222.

their certificates for as low a rate as twenty cents an acre. These certificates immediately passed into the hands of speculators in New Orleans and other cities in the United States so that when the scrip of the government was offered for sale, its value was immediately depreciated to the level of the certificates held by the speculators. As a result, the government was unable to sell its scrip for cash or to purchase supplies for the army without paying an advance in price of one hundred to two hundred per cent.²⁴

SALE OF VACANT PUBLIC DOMAIN

In the early days of the Republic of Texas, physical property of a taxable nature existed only to a very limited extent, and the foreign commerce of the infant republic was unable to bear a high duty for the support of the government. In 1840 the revenues, nominally, were \$458,000, but in fact they yielded only a little over \$90,000; whereas the government expenses during that year were upward of four times that amount.²⁵ But the nation was rich in its landed estate and everyone was hopeful. If the political organization of the government could only be maintained and its dormant resources developed, the revenue from the disposition of its public lands and from the increased value of physical property available for taxation would in after years be much more than sufficient to liquidate the debt. Consequently, accounts were run, loans were made and promissory notes of the government were issued with a lavish hand. In fact, nearly every legitimate device known to human ingenuity, which could be made to produce money or expand the credit of the nation, was employed.²⁶

²⁴ Houston, President Sam, *House Journal, Special Session, 1836-8*, p. 64.

²⁵ Yoakum, *op. cit.* 2: 317.

²⁶ The following comment regarding the efforts of the Republic of Texas is taken from Mr. Barker's account of the *Finances of the Texas Revolution*, (*op. cit.* p. 612): "Under these conditions, then, how were the Texans enabled to establish a government, maintain an army and accomplish their independence? Mr. Henry M. Morfit declared to Secretary Forsyth that the means were derived principally 'from the sympathy of their neighbors and friends in the United States and by loans upon the credit of the state', while Mr. Gouge, in his *Fiscal History of Texas*, somewhat facetiously remarks that the various expedients of governments for raising funds in such

So fruitful were the efforts to borrow money that by the end of the second year of its existence the nation had acquired a public debt of more than \$2,000,000; and by the end of President Lamar's administration in 1841, this amount had been increased to \$7,500,000. But worse than the amount of its public debt was the fact that the government securities had been peddled about the United States as a matter of speculation until the value of many of them had fallen to less than twenty cents on the dollar.²⁷

The debt of the Republic of Texas was liquidated by the fixing of the northern and western boundaries of the state with the United States government and the transfer to that government of the land which now comprises the larger part of New Mexico for \$10,000,000 in government bonds bearing five per cent interest, on condition that \$5,000,000 of this fund be retained in the United States Treasury to pay those debts of the state of Texas for which duties on imports had been specially pledged.²⁸ In reality, this transfer was a sale to the federal government of approximately 67,000,000 acres of the public domain.

Considerable opposition to this transfer manifested itself in Texas because the creditors of the state, whose debts had been sealed down by a public auditing committee authorized by the legislature so that speculation in them was being diminished, were clamoring for the full face value of their claims and had a large lobby in both houses of Congress at Washington which was insisting that the federal government force the state to meet their demands.

"While this measure was pending in Congress many citizens (of Texas) looked upon it as a sort of bribe to surrender a principle of right, and their feelings in opposition to it were wrought up to the highest pitch of desperation. With the great body of citizens, however, it was regarded as the best that could be done under the circumstances."²⁹

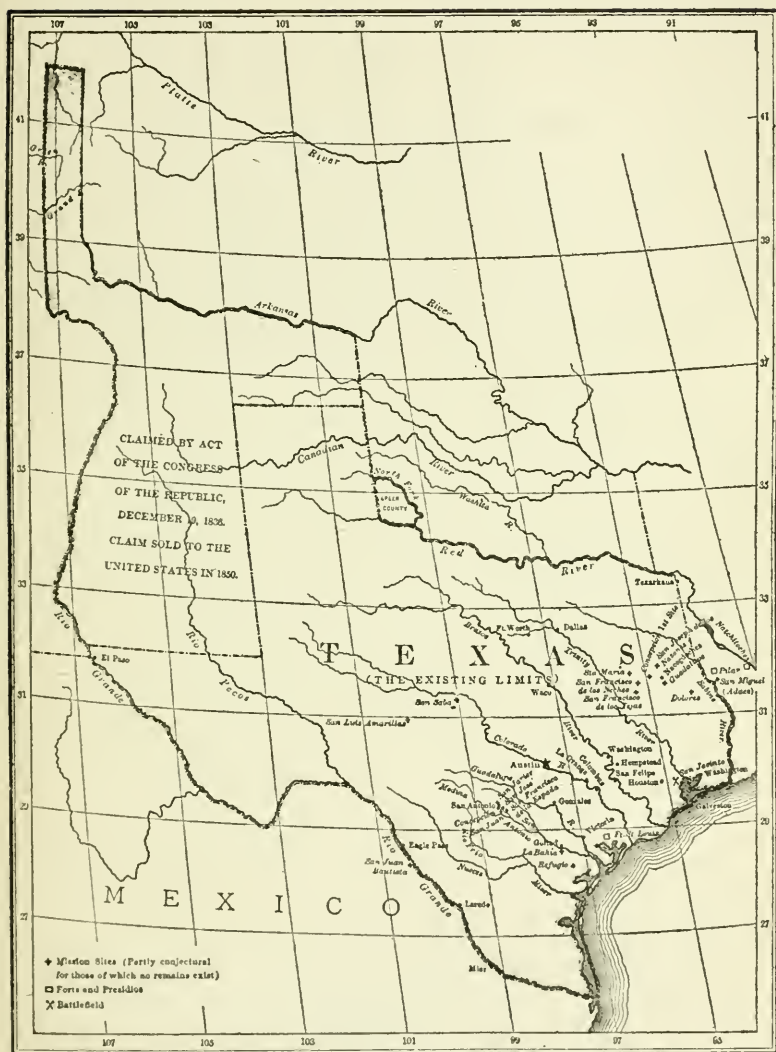
On the other hand, General Houston, who was the senator from

exigencies may be resolved into 'taxing, borrowing, begging, selling, and robbing and cheating', and that the Texans apparently determined to try all six."

²⁷ Garrison, *op. cit.* pp. 235-6.

²⁸ Sayles, *Early Laws of Texas*, 2: 267.

²⁹ Wooten, *op. cit.* 2: 29.



Courtesy of Houghton Mifflin Co., Boston.

MAP ILLUSTRATING HISTORICAL GEOGRAPHY OF TEXAS.

Texas at that time, regarded it "as the best sale ever made of land of a worthless quality and a disputable title."³⁰

The payment of the \$10,000,000 by the United States enabled Texas to clear away all of the old debt of the Republic and left it a handsome surplus in the treasury. Very little effort was made thereafter to sell any of the public land until the close of the Civil War. Acts were passed, however, in 1858 and 1860 which authorized the land commissioner to sell land scrip at the rate of one dollar an acre, which might be located on any part of the vacant and unappropriated public domain.³¹ It appears that only twenty-three sales, aggregating 10,506 acres, were made in accordance with these laws, and they were only, therefore, of minor importance. But in 1876, the state government was once more pressed with a debt amounting to nearly \$5,000,000,³² and again it looked to its public lands for relief from the burden. Consequently a law was passed in 1879 which set apart all of the vacant land in forty-four counties to be sold at the rate of fifty cents an acre and directed that one-half of the proceeds from such sales should be credited to the school fund and the other half applied to the "payment and extinguishment of the bonded debt of the state as fast as the same became due and payable."³³ So urgent was the necessity for selling this land that "any person, firm or corporation" desiring to purchase it was authorized to do so upon having it surveyed by a public surveyor. The land could not be sold, however, in tracts of more than 640 acres.

As a source of revenue, this method of disposition was not a very important one, especially when the results that were obtained under it are compared with the debt it was expected to help liquidate. The records of the general land office show that only 3,321,873.72 acres were sold under the law mentioned above and two similar statutes which supplemented it. These sales brought into the treasury \$1,769,572.79, one-half of which was

³⁰ Quoted in Gouge, *Fiscal History of Texas*, p. 180.

³¹ Sayles, *Early Laws of Texas*, 2: 452 and 466.

³² Wooten, *op. cit.* 2: 218.

³³ *Act of July 14, 1879*, Civil Statutes, 2: 681.

transferred to the school fund.³⁴ Fewer than one million dollars, less than one-fifth of the amount needed, were available, therefore, for application to the public debt. Its policy, however, was severely criticized as "selfish," "unwise," "unstatesmanlike" and "a gross injustice" because it reserved a vast body of lands for the satisfaction of a public debt then existing and deprived holders of valid certificates for land of any chance for their satisfaction.³⁵ The criticism seems to have been well founded, for the constitution probably never contemplated that the current expenses of the government should be met by a sale of public lands. Such a payment is what this law really amounted to, for all the debts incurred on account of the Civil War were of course repudiated by the first reconstruction legislature.

³⁴ Charles Rogan, Commissioner of the General Land Office, *Special Report*, 1899, p. 30. The two similar statutes referred to are the Act of February 20, 1879, and the Act of March 29, 1887.

³⁵ *Texas Review*, 1885, p. 184.

CHAPTER V

LAND GRANTS FOR EDUCATIONAL AND ELEEMOSY-
NARY INSTITUTIONS

SCOPE OF THIS LEGISLATION

The legislature is practically unrestricted in its control over the vacant and unappropriated portions of the public domain. It may sell such public lands on easy terms, or even give them away, in order to encourage settlement or to aid in the construction of railways. But not so with public lands set apart for particular funds, especially those that have been so appropriated by constitutional provisions. Such lands are still public lands, but the control of the legislature over them is limited to the extent that they must always be disposed of, theoretically at least, so as to realize the largest possible income for the fund. The interests of the fund rather than of the settler are the consideration of primary importance in this case. A study of the laws which appropriate such lands to particular funds is, therefore, the first step in a discussion of land grants for the support of the special institutions. Then follows in natural order a study of the laws enacted for the final disposition that has been made of them and of the proceeds that have been derived from the fund. And so far as Texas is concerned, this study must also include an account of the disposition of the timber and mineral lands, for practically no laws have been enacted there in regard to these lands, except for such as belonged to the free school and other public funds.

THE RESERVATION AND APPROPRIATION OF PUBLIC LANDS

In the autumn of 1838 when the Republic of Texas was scarcely more than two years old, President Houston made the

following significant statement in reference to creating a perpetual endowment for public school purposes by reservations of public land:¹

"The present is a propitious moment to lay the foundation of a great moral and intellectual edifice which will in after ages be hailed as the chief ornament and blessing of Texas. A suitable appropriation of lands to the purpose of general education can be made at this time without inconvenience to the government or the people; but defer it until the public domain shall have passed from our hands, and the uneducated youths of Texas will constitute the living monuments of our neglect and remissness. A liberal endowment which will be adequate to the general diffusion of a good rudimental education in every district of the Republic and to the establishment of a university where the highest branches of science may be taught can now be effected without the expenditure of a single dollar. Postpone it a few years, and millions will be necessary to accomplish the great design."

The statement of President Houston, doubtless, is typical of the sentiment which prevailed in the Republic at that time when the policy of endowing a free school system with public lands was first adopted. This policy has been consistently followed and enlarged ever since and seems to have met with very little effective opposition at any time. In fact, since a large majority of the citizens of Texas were landowners, these reservations were a great economic advantage to them; first, because large quantities of free land were in this way withdrawn from the market for a time, and the value of the lands privately owned were thereby enhanced; and second, because the funds thus built up would ultimately reduce the rate of taxation on these same lands, privately owned. The object of this reservation policy was very concisely stated by the commissioner of the general land office, who, in commenting on the permanent school fund, recently said:² "This fund was not created and founded by our fathers as a charity fund, but for the purpose of educating the masses with the least rate of taxation to the individual."

The constitution of Texas (Art. VII, sec. 3) requires that a free school be maintained in each district at least six months out of each year. Subsequent legislation has required the County

¹ Quoted in Wooten, *op. cit.* 2: 428.

² Commissioner of the General Land Office, *Biennial Report*, 1902, p. 56.

Commissioners' Court³ to subdivide each organized county not so divided into school districts and to organize any unorganized county attached to it for judicial purposes into one or more districts upon the written petition of no fewer than ten residents of such unorganized county. The money necessary for the support of these schools is derived from the available school fund of the state which is apportioned to the various cities, towns and districts on the basis of scholastic population, the available county school fund, and from local taxes which may not exceed fifty cents on each one hundred dollars worth of property.⁴ Lands on a frontier settlement, however, cannot yield much revenue from local taxation; consequently a period of years must elapse after they pass into private hands before sufficient revenue can be secured from them to maintain an adequate school system. If a system similar to the one prevailing in Texas, therefore, is to be maintained, it must be at the expense of the older communities, except insofar as that expense may be offset by the income derived from a permanent fund.⁵ But support for common schools wholly dependent upon taxation is also dependent upon the will of the persons taxed as expressed through their legislative bodies; and so unless some adequate provision has previously been made, the more remote the school from the source of its income, the more likely it is to suffer on account of a lack of funds.

Thus the reservation policy serves both to render the support for schools in distant rural and sparsely populated districts absolutely certain and to equalize the burden of taxation by including a part of this support in the price of the lands. Moreover, it has the additional advantage of being constant and easily administered. When the lands have once been sold and the proceeds invested, the system is automatic and self-operating, whereas a tax system is impulsive in that it is subject to the

³ *Acts of 1893*, p. 182, sec. 40; see also, *Revised Civil Statutes*, 1911, p. 600.

⁴ *Revised Civil Statutes*, 1911, pp. 576, 603 and 605. The County Commissioners' Court is composed of four commissioners, each elected from a commissioner's precinct for a term of two years, and the county judge who, when present, is the presiding officer of the court.—*Revised Civil Statutes*, 1911, p. 478.

⁵ See Appendix III, g.

whims and caprices of legislative bodies and clumsy in that it requires a large administrative force constantly employed for the purposes of assessment and collection. If a school land reservation policy does not work out evenly and successfully, its failure must be attributed to a short-sighted legislative policy in disposing of the land and prescribing regulations for the investment of the proceeds, or to an inefficient administration of these laws.

The policy of reserving public lands for the benefit of the school fund received its first legal recognition in the act of January 26, 1839, which set apart three leagues (of 4,428 acres each) in each county for the purpose of establishing a primary school or an academy.⁶ It also directed the president of the republic to have fifty leagues surveyed from any part of the vacant domain for the establishment and endowment of two universities or colleges afterwards to be created. The following year another law was passed which created a county board composed of the chief justice and two associate justices in each county to be known as the "Board of School Commissioners."⁷ This board was given full power to receive and administer any land or other property that might be given or appropriated to the county for the benefit of its schools or academy. It was directed to have the three leagues previously granted by Congress properly located and surveyed and in like manner to have an additional league surveyed which might be sold and the proceeds applied to the purchase of apparatus, one-half of which was to be used in the academic school of the county and the remainder distributed equally among the various common school districts.

None of the lands appropriated by the law of 1839 could be disposed of except by lease during the first three years after they were appropriated, and in addition to this, all leasing contracts were limited to a term of three years. The Constitution of 1845 enabled the counties which did not contain four leagues of vacant land within their borders to have a quantity surveyed in some other county sufficient to make up the full four leagues.⁸

⁶ Sayles, *Early Laws of Texas*, 1: 319.

⁷ *Ibid.*, p. 390.

⁸ Article X, Sections 3 and 4; for interpretation of these sections see *Bell County v. Alexander*, 22 Texas 363.

In addition to this, it extended the time during which this land could not be sold to twenty years. In this way improvident and hasty disposition of the county school lands was prevented. Similar provisions were also placed in the Constitution of 1861.⁹

The early legislative and constitutional provisions relating to this subject were afterwards supplemented by additional laws which were intended to provide similar quantities of land for new counties as soon as they were organized. In 1875 four leagues were appropriated to each organized county which had not received a grant of lands for school purposes.¹⁰ These lands could be surveyed from any of the vacant domain of the state. Another law was afterwards passed which specified that all unorganized counties were entitled to similar quantities of school land and a special reservation of 325 leagues was made from the vacant domain in which each unorganized county might claim its share as soon as it was organized.¹¹ The evident intention of the legislature, therefore, was to provide each county, whether organized or not, with four leagues of school land; it appears, however, that only 239 counties have received such land, that a few have not received the full quantity, and that there are eight unorganized counties which will not receive any such land.¹²

Up to the time of the adoption of the Constitution of 1866, the power to dispose of county school lands seems to have rested fully in the hands of the board of school commissioners in each of the several counties. At this time, however, full power to control these lands was given to the legislature and it was authorized to sell them under such terms as it might prescribe, except that lands which had already been patented to a county could not be sold without the consent of that county.¹³ This provision was also continued in the Constitution of 1869,¹⁴ but the legislature appears never to have made use of its authority to dispose of the county school lands. The validity of the title

⁹ *Civil Statutes*, 4: 251.

¹⁰ Sayles, *op. cit.* 3: 325.

¹¹ *Civil Statutes*, 1897, 2: 1518.

¹² Commissioner of the General Land Office. *Biennial Report*, 1910, p. 30.

¹³ *Civil Statutes*, 4: 329.

¹⁴ *Ibid.*, p. 442.

of a county to its school land became a question, however, for judicial determination and in 1873 the state Supreme Court decided that that section of the Constitution of 1869 which related to the power of the legislature to sell county school lands was not intended to divest the county of its right of property in land. In part, the court said:¹⁵ "The state had parted with the title to a body corporate, capable of receiving and holding the title to land, and it had not the power or authority under the constitution of the United States, to recall her grants or violate her executed contracts."

This problem was permanently and finally disposed of in the Constitution of 1876 which stripped the legislature of all its power to dispose of county school land and vested it in the County Commissioners' Court. It was constitutionally declared that land which had been patented to a county was the property of that county and that the title vested in its corporate organization in such a way that no adverse possession or limitation could ever be made against it.¹⁶ The Commissioners' Court was therefore authorized to sell or dispose of the county school land in such a manner as it might see fit. In the subsequent legislation intended to give effect to this constitutional provision, the only restrictions placed on the authority of the Commissioners' Court have been that the proceeds from the sale of these lands must be invested in bonds of the state of Texas or of the United States and that actual settlers must be protected in the prior right to purchase such lands to the extent of their settlement not exceeding 160 acres.

Nearly twenty years after Texas began to reserve and appropriate public land to counties for school purposes, it also adopted the plan of reserving public lands in order to build up a permanent school fund for the state. And just as the policy of reserving lands for counties was faithfully followed up until four leagues, speaking generally, had been provided for each county,

¹⁵ *Galveston County v. Tankersley*, 39 Texas 651, 1873. This holding of the Supreme Court rests on the fact that the appropriation of land to a county is held to be a contract, and therefore, the case comes under that clause of the United States Constitution which prohibits a state from enacting any legislation that impairs the obligation of a contract. (p. 657).

¹⁶ See Appendix III, h.

so the policy of reserving state school lands was continued and enlarged as long as there was any vacant domain to reserve.

Consequently, a dual system of public school lands has grown up in Texas, one part of which consists of county school lands which are subject to the disposition of the County Commissioners' Court, and the other, the state school lands, which are subject to the disposition of the legislature.

The general law which donated lands to railway companies specified that alternate sections which these companies were required to survey for the state should not thereafter be subject to location or settlement under any form of valid land certificate, but that they should be reserved for the state and should be subject to future disposition by the legislature.¹⁷ Millions of acres were surveyed under this law and were offered for sale at the rate of one dollar and twenty-five cents an acre.¹⁸ The proceeds from such sales were directed to be deposited in the state treasury to the credit of the public school fund. This offer of sale seems to have remained on the statute books until after the Civil War, but the school fund did not derive much benefit from it, because it was only one of the provisions of the act of 1858, and as we have already seen, 10,506 acres were sold under any of the provisions of the whole law.¹⁹

The constitutional convention of 1866, however, conceived the idea of transferring the title for the lands to the school fund and of directing the legislature afterwards to make provision for their sale and lease for the benefit of this fund. In this way they would be made a perpetual endowment for the public schools, whereas under the former laws the proceeds from their sale or use might have been diverted to some other purpose according to the discretion or caprice of any subsequent legislature. The constitution, therefore, reserved from settlement the alternate sections of all those grants that had previously or that might thereafter be made to railway companies or to any other corporation authorized to receive grants of land donated for the purpose of encouraging the development of the wealth and re-

¹⁷ Sayles, *Early Laws of Texas*, 2: 326.

¹⁸ *Ibid.*, 2: 452.

¹⁹ See p. 86.

sources of the state, *and appropriated them* to the school fund.²⁰ It also directed the legislature to provide for their future sale and lease so as to give the preference rights to actual settlers. This same method of disposition was continued in the Constitution of 1869.²¹

By the time this constitution was adopted, the plan of reserving public lands for the benefit of the school fund had become pretty well established as a fixed policy of the state. Moreover, the fact that the public domain was being rapidly taken up to satisfy the demands of settlers and the claims of railway and other corporations was emphatically impressing itself upon the public mind. It was clearly seen that if any large additions were made to the reservations already provided, action would have to be taken soon. This was done in 1873 when one-half of the public domain as it then existed, or as much thereof as could be, was reserved and appropriated for the benefit of the school fund.²² This was in addition to all reservations that had been previously made. This reservation and all that had been made previously were expressly incorporated into the Constitution of 1876.²³ Lands forfeited by railway companies and those in unorganized counties sold to the state for taxes have also been appropriated to the school fund.²⁴

Thus it will be seen that all the alternate sections surveyed by railway and other internal improvement companies, all lands forfeited by railway companies, lands in unorganized counties sold to the state for taxes, and one-half of the vacant and unappropriated public domain as it existed in 1876, have been reserved from settlement and appropriated to the permanent school fund of the state.

A similar policy has been followed in reference to the university and four different state asylums. Almost simultaneously with the appropriations to the state and county school funds similar ones were made until over two million acres had been

²⁰ Art. X, Sections 2, 3 and 4.

²¹ Art. IX, sec. 6.

²² Sayles, *Early Laws of Texas*, 3: 177.

²³ Art. VII, Section 2.

²⁴ Sayles, *Early Laws of Texas*, 3: 463.

set aside for the university and one hundred thousand acres for each one of the four asylums.²⁵

THE SALE AND LEASE OF RESERVED LANDS²⁶

Although other laws relating to this subject had been previously enacted²⁷ the first definite and comprehensive policy of sale and lease of the reserved lands found its expression in the law of 1883.²⁸ This act provided that all the lands set aside for these public purposes should be leased and sold according to the provisions therein specified, and created what was known as the "School Land Board" consisting of the governor, attorney general, comptroller, treasurer and commissioner of the general land office, to transact this business for the state. The board was directed first of all to make a classification of all the lands into agricultural, pasture and timber lands and to ascertain what tracts had permanent water on them or bordering on them. A minimum price of \$2 an acre was placed on all surveys of land without permanent water on them, \$3 an acre for all watered land, \$5 an acre for all land having timber on it suitable for lumber, and \$2 an acre for all other land classified as timbered land but not such as would be suitable for making lumber.

The lands were then ordered to be placed on the open market in the county or land district in which they were situated and sold under a system of competitive bids which the land board was directed to prepare and prescribe. No one could purchase more than one section of agricultural land or seven sections of pasture land. Agricultural land could be sold only to actual settlers. Corporations were also prohibited from acquiring title to more than one section of any kind in any one county. A purchaser might sell his land at any time after he had made the

²⁵ *Ibid.*, 2: 393; also Sayles, *Early Laws of Texas*, 1: 319 and 2: 447, and *Revised Civil Statutes*, 1911, p. xliii and 560 for university lands.

²⁶ Practically all of the laws passed since 1883 which relate to the sale of public lands refer expressly to the sale and lease of the "free school, university and asylum lands." Unless otherwise designated hereafter the term "reserved lands" as used in this monograph includes all of the lands reserved and appropriated for these purposes.

²⁷ *Laws of Texas*, 1879, *Special Session*, p. 23; also 1881, p. 119.

²⁸ *Civil Statutes*, (1897), 2: 1972; *Laws of Texas*, 1883, p. 85.

first payment by filing an authenticated transfer to the vendee. In this event the vendee assumed all the obligations and liabilities of the original purchaser.

The purchaser was required to pay one-thirtieth of the amount bid in cash and assume an obligation to pay the balance in yearly installments consisting of one-thirtieth of the whole price. He also assumed an obligation to pay interest on the whole amount of the unpaid purchase money at the rate of five per cent. Failure to pay an annual installment of the purchase price would not work a forfeiture of the land until the whole sum was due, but failure to pay the interest when due would forfeit the land immediately.

Pasture lands, not timbered, could be leased in any quantity suitable for stock and ranch purposes for a period of ten years at a minimum annual rate of four cents an acre. The school land board was directed, however, to work out a system of competitive bidding for leases similar to that of sales. When applications were made for both sale and lease of the same section, the sale was to have the preference.

A great deal of fault was found with the School Land Board as an administrative body because it was composed of the executive officers of the state, each one of whom was chosen for his special fitness to represent the state in a political capacity.²⁹ Each member was thus overloaded with work in his own department. In addition to this, the board was too bulky and unwieldy to serve the state as a business agent. Consequently, the governor and the commissioner of the general land office recommended that the legislature place the authority to sell and lease the public lands all in one individual who would be able to devote practically his whole time and ability to this business and who should be required to give bond for the faithful performance of his duty. The law was, accordingly, amended in 1887. The School Land Board was abolished, but instead of authorizing a special officer to do this work the whole responsibility was placed upon the commissioner of the general land office in addition to his other duties. He was directed to dispose of the pub-

²⁹ Commissioner of the General Land Office, *Biennial Report*, 1886.

lie lands according to law and to make such additional regulations as might be necessary and not inconsistent with the constitution.

In addition to the foregoing change, the law of 1887 directed the commissioner of the land office to have all the lands that were in demand for immediate settlement "carefully and skillfully classified and valued."⁸⁰ To assist him in doing this work he was authorized to appoint, with the approval of the governor, as many competent state agents as might be necessary and to pay them a salary not to exceed \$150 a month and their traveling expenses. These state agents were required personally to examine the land desired for settlement and to classify it as agricultural, pasture or timber land. They were also required to make an accurate plot of each section examined which would show the topography of the land, the quality of its soil, its proximity to water, the streams and other sources of water supply, noting their location and paying *special attention* to such streams as might afford permanent water; the relative proportions of timber and open land and their location, and also the quality and kind of timber.

Upon the basis of the information furnished by the state agents, the commissioner was required to value the land and to notify the county clerk of each county of the valuation fixed upon each section of land in his county and in each county attached to it for judicial purposes. These valuations were required to be kept by the county clerk in a well-bound book which should always be open to public inspection. Any prospective purchaser might thus ascertain the valuation placed upon the lands by the commissioner and expect to acquire them by making an application to purchase on a form prescribed by law in which he offered not less than the price fixed by the commissioner. The lands could not be sold in any case, however, for less than \$2 an acre for pasture lands, \$3 an acre for all sections having permanent water thereon or bordering thereon, and \$5 an acre for all timber lands which were defined as those valuable chiefly for the timber on them. They could not be sold

⁸⁰ *Laws of Texas*, 1887, p. 83.

in quantities to exceed 640 acres, except dry pasture lands which might be sold to settlers in quantities not to exceed four sections, nor under any circumstances to a corporation, either foreign or domestic. Moreover, all sales to a settler were required to be made on the expressed condition that any subsequent sale or transfer to a corporation, either immediate or remote, would *ipso facto* terminate the title of the purchaser and the land be forfeited to the state to revert to the fund to which it formerly belonged. Purchasers were also required to make an affidavit to the effect that they were not acting in collusion with others for the purpose of buying the land for any other person or corporation and that no other person was directly or indirectly interested in the purchase of the same.

In most other respects the law was quite similar to the act of 1883. The credit, however, which was allowed on the purchase price was extended from thirty years to forty years, but on the same conditions. Moreover, any actual settler who had purchased under former laws, but whose land had been forfeited because of failure to pay the yearly installments or interest on the purchase price, was given a six months' prior right after the passage of this law in which to repurchase his land at such a price as the unpaid principal at the time of the default and the interest due thereon would aggregate. Thereafter he would be governed by the same penalties, restrictions and requirements as were imposed upon other purchasers. The time of leasing contracts was also shortened from ten years to five years.

More than 14,000 sales aggregating nearly 6,400,000 acres were made according to the provisions of this act.³¹ The law is generally believed to have been a good one and it is said that if it had been amended in two particulars, namely, one reducing the rate of interest and another providing for forfeitures and the collection of obligations, the school fund would have profited much by its continued operation.³²

But certain forces were at work in the legislature which had in mind the opening of the school lands for speculative purposes

³¹ Commissioner of the General Land Office, *Biennial Report*, 1898, pp. 11-12.

³² *Ibid.*, 1902, p. 52.

under the guise of providing homes for actual settlers. The result of this effort was the repeal of the law in 1887 and the substitution of the act of 1895.³³ Whatever the ostensible purpose of this new law may have been, the results of its operation show conclusively that it was designed and constructed in such a way as to yield a handsome profit to speculators rather than an income to the school fund.

Within three years after the passage of the law of 1895, 8,385 sales approximating 4,000,000 acres of land that had been sold under former laws for not less than \$2 an acre, with interest at five per cent, had been forfeited for the nonpayment of interest.³⁴ During the same period 12,056 sales aggregating 5,538,723 acres were sold according to the terms of the new act, mostly as grazing land at the rate of \$1 an acre with interest at three per cent. It has been estimated that the school fund thereby lost not less than \$8,000,000, and probably as much as \$12,000,000.³⁵

The explanation of these enormous forfeitures lies in the fact that the purchase price was reduced fifty per cent and that the land could be reclassified and revalued by local boards. The new law took the power to classify and value the school lands out of the hands of the state land commissioner and his special agents and placed it in the hands of a local board composed of citizens of the county in which the school lands were situated. This board had not only the power to classify and value lands theretofore unclassified, but also to revise the classifications that had been made by the land commissioner and his special agents. It seems that these local boards were largely made up of county judges and county commissioners and it is asserted in official reports that many of these men were either directly interested themselves in the purchase of reserved lands at a reduced valuation or they had a client or constituency to serve who wanted to buy at a reduced price. The law further gave a purchaser who had forfeited land secured under the former laws, *ninety days' prior right to repurchase* under the terms of the new act. The result was inevitable. To use the exact language of the

³³ *Laws of Texas*, 1895, p. 63.

³⁴ Commissioner of the General Land Office, *Biennial Report*, 1898, pp. 11-12.

³⁵ *Ibid.*, 1902, p. 26.

commissioner, "Therefore, while it was ruinous to the school fund, it was poor business on his (the former purchaser's) part if he did not decline to pay the interest on a \$2 or \$3 purchase, let the land be forfeited to the state, and again buy it at \$1 per acre at a reduced rate of interest."³⁶

The writer can describe the way in which this law operated in no better or more forceful terms than those used by the Land Commissioner, Charles Rogan, in his biennial report in 1902. He says:³⁷

"The laws of 1895, 1897, and 1901 are full of contradictions and glaring inconsistencies. Every time the law has been tinkered with, since the passage of the Act of 1887, it has been against the best interest of the school fund. While the laws were enacted ostensibly for the benefit of the actual settler, he has derived but little benefit from them. The chief beneficiaries have been land agents, speculators and bonus hunters, and finally the ranch men. The cream of the school land has been sold. It has passed beyond the control of legislation, or the jurisdiction of the state under improvident laws. It has been sold to people who swore that they were actual settlers, and who swore that they were purchasing the same for a home. But the acts of 1895 and 1897 authorized the wholesale reduction in value of this land from \$2.00 and \$3.00 per acre to \$1.00 and \$1.50 per acre. It also required the sale to be made on forty years' time at only three per cent interest, requiring the payment of only one-fortieth of the principal in cash, which was most usually \$16 on 640 acres of land. It also permitted him to purchase as much as four sections, with the privilege of selling any or all of this land so purchased, at any time. These provisions were only a delusion and a snare. It did not procure actual bona fide settlers in a majority of cases, although no sales have been made except to those who swore they were such. It only invited wholesale speculation on the part of purchasers and land agents, and clothed in the robes of a settler only such makeshift of settlement as was made in most cases until such time as they could swear to three years' occupancy, and sell to some one else, in many instances to large land holders for a good round bonus, while many of them sold their claims within a week or a month after purchasing the same from the state."

Many strange and remarkable transactions are recorded in the annals of school land legislation,³⁸ but this one is without

³⁶ *Ibid.*, p. 55.

³⁷ *Ibid.*, p. 52.

³⁸ For a good account of losses incurred to permanent public school funds throughout the United States, see Swift, *op. cit.* pp. 129-159.

parallel. A near approach to it, perhaps, in the way of valuations reduced by legislative authority, is found in Michigan where the school fund lost \$175,000 as the result of a law which permitted a revaluation of the land and a credit to the purchaser of the difference between this appraised value and his contract price.³⁹ But the modest sum of \$175,000 shrinks into sheer insignificance in comparison with more than \$8,000,000.

In spite of the fact that the defects of this law and the enormous losses which it was entailing upon the school fund were repeatedly pointed out by successive land commissioners in such statements as the one just quoted, it remained on the statute books for ten years without any substantial modification or improvement. By far the largest and best part of the school lands were sold under its disadvantageous terms. Commissioner J. J. Terrell and his assistant, J. T. Robison, who is the present commissioner, however, worked out a plan for selling the remainder of the reserved lands by sealed competitive bids. This plan was enacted into law in 1905 and has made possible the realization for the school fund of very nearly the whole market value of the land which still remained to the credit of the various funds,⁴⁰ and which has been sold since that time.

In addition to the feature of sealed competitive bids, the new law abolished the system of classification and valuation by citizens of the county in which the land is situated. The land commissioner is now authorized to "classify or reclassify, value or revalue" any of the public lands, except those which belong to the university fund, whenever the public interest may require such classification or valuation. Any necessary changes in the valuation may even be made after the land has been advertised, but this is done only in extraordinary circumstances.

Owing to the fact that with the passage of this law the state gave up that part of its school land policy which had to do with the leasing of reserved lands, the expiration of a lease serves to bring the land immediately upon the market; and in cases of cancellation, the land comes on the market ninety days thereafter. The commissioner is required to give publicity to these

³⁹ See Appendix III, i.

⁴⁰ *Laws of Texas*, 1905, p. 159.

facts, insofar as practicable, ninety days before the land is actually offered for sale. In order to do this he is authorized to prepare and print a list or lists of such land at the expense of the state and send them out in the mail to every person requesting them. This list as it has been subsequently published by the commissioner contains the designation of the tracts of land for sale, the date on which they will come on the market, the name of the lessee and the number of his lease, the name of the grantee, the number of acres, the minimum valuation fixed by the commissioner and the classification as agricultural, grazing, timber or mineral land. It also contains directions to prospective buyers in regard to the method of making their applications for purchase and an epitome of the law under which the lands are to be sold. With the aid of this list and a Land Office map of the county in which he desires to locate, a purchaser can find the locality of any survey without the assistance of a land or real estate agent. The terms of the sale are payment in cash of one-fortieth of the purchase price and the balance in equal annual installments with interest at three per cent.⁴¹

With the exception of a few amendments of minor importance, as far as general principles are concerned, the law of 1905 is the one under which the public lands of Texas are now being acquired by private owners. The gain to the school fund during the first year after its enactment was more than \$3,500,000 in the sale of 4,819,659 acres.⁴² Moreover, the total increase to the school fund under this "highest bidder" or "competitive bidding" law was \$24,514,947.18 up to the close of the fiscal year 1914.⁴³ In fact, the land commissioner says that some of this land which would have been purchased at \$1 and \$2 an acre has proved so valuable "that people are almost tumbling over each other to get it at from \$12 to \$22 per acre."⁴⁴

The university and asylum lands were always included in the laws providing for the sale of free school land until 1895.⁴⁵ At

⁴¹ See Appendix III, J.

⁴² Commissioner of the General Land Office, *Biennial Report*, 1908, pp. 3-4.

⁴³ *Ibid.*, 1914, p. 3.

⁴⁴ *Ibid.*, 1908, p. 4.

⁴⁵ *Civil Statutes*, 1897, 2: 1513.

that time the control and management of the university land was taken out of the hands of the land commissioner and vested in the board of regents of the university. The only restriction placed upon the regents in their disposition of these lands was that they should not be sold for a lower price per acre than the same class of land belonging to other funds. The policy of the board, however, has been to retain the lands and lease them. Out of a total of 2,289,682 acres appropriated for this purpose 2,072,225 acres were under lease in 1908 at an average rate of 4.9 cents an acre and yielded a net return to the university of \$103,312.83 for that year.⁴⁶ The management of the asylum lands was left in the hands of the land commissioner and they have been disposed of in the same manner and under the same laws as the free school lands.

⁴⁶ See Appendix III, k.

CHAPTER VI

LAND GRANTS FOR EDUCATIONAL AND ELEEMOSY-
NARY INSTITUTIONS (Continued)

TIMBER LANDS

The use of timber on the public lands of Texas was wholly unrestricted by legislative regulation until after 1879.¹ The only reference to this subject that appears in the statutes is found in the charters of some early railway companies and in the general statutes relating to the construction of railways. In these instances the corporation is given a right-of-way across the public lands and also the right to use such timber and other building material found upon them as might be necessary for the construction of the proposed lines.

An attempt was made in 1858, however, to make the laws relating to the destruction of timber on the lands of a private owner applicable also to public lands, but this attempt failed. A statute of 1848 made it a misdemeanor for any person wilfully and knowingly to cut down, carry away, or destroy any tree or timber on land not his own.² In 1856 this law was amended so as to fix the penalty for its violation at three times the value of the timber unlawfully cut down or removed.³ Two years later James Howard was indicted for having cut timber on land not his own inasmuch as he had cut and removed timber from lands belonging to the state, and he was being prosecuted under the statute of 1848. The Supreme Court quashed the indictment, however, on the ground that the term "owner" as used in the statutes applied only to private holders and not to the state.⁴

¹ *Civil Statutes*, 2: 423.

² Hartley, *Digest of the Laws of Texas*, 203.

³ Paschal, *Digest of the Laws of Texas*, 461.

⁴ *State v. Howard*, 21 Texas 416, 1858.

Since the act under which Howard was being prosecuted did not expressly declare the cutting of timber on public lands to be an offense, the court held that such a construction as to its intent would not be fair or reasonable. It was said in the opinion that the state is inviting settlers to occupy her lands; and though it has not authorized, yet is has not prohibited, the conversion of public timber to private use.

Since no distinction between agricultural and timber lands was made in the statutes, most of the timber lands have been transferred to private owners in the same manner and on the same terms as agricultural lands. The only exception to this rule is found in the disposition of the small quantity of timber lands that happened to be included in the regular surveys and reservations of the public domain for the free school, university and asylum funds. If the land was valuable chiefly for the timber which stood on it, the grantee acquired title to the land with the timber as a preemption claim, a homestead donation or a grant to an internal improvement company just as though the land were valuable chiefly for its wheat or cotton producing qualities.

Approximately 300,000 acres of timber lands were included in the reservations and appropriations that were made to the public school, university and asylum funds.⁵ Since the passage of the law of 1879 providing for the sale of all these lands, a distinction has been made between timber, agricultural and grazing lands. Generally speaking, the price of timber lands has not been lower than five dollars an acre and credit has not been so freely extended to the purchaser as in the sale of agricultural and grazing lands. The protection afforded by such restrictions was greatly offset, however, by a provision in the law of 1895 which authorized the sale of timber on timber lands at less than five dollars an acre whenever the land commissioner ascertained by approved agents that the land contained timber of but little value. The use of timber on reserved lands has also been considerably restricted, especially to the extent of prohibiting the removal of more timber than was necessary for

⁵ Commissioner of the General Land Office, *Biennial Report*, 1904, p. 9.

clearing and improving the land, or for firewood and building purposes. In some instances the timber and the lands have been sold together, and in others the timber has been sold; and after its removal, the land has been sold as agricultural and grazing land. Since 1905, land on which there is merchantable timber cannot be purchased until the timber has been paid for in cash.⁶

The timber lands of Texas comprise more than 42,000 square miles, an area half as large as the state of Kansas and larger than the state of Ohio.⁷ Approximately five-sixths of this area has been described as "merchantable forest" from which nearly a billion board feet of lumber are cut annually. The lumber industry in Texas is exceeded only by the cotton and cattle industries, and the product secured is described in a United States government bulletin as consisting especially of those varieties of lumber as are suitable for the manufacture of furniture, wagon timbers, implement handles and all manner of things now shipped into the state from long distances, to say nothing of the great quantities of ties, staves and posts that are being secured from ordinary grades of oak.⁸ In 1910 there were 799 establishments in Texas engaged in the manufacture of lumber and timber products which employed approximately 24,000 wage earners and turned out an annual product valued at \$32,201,000.⁹ During the decade, 1900 to 1910, the lumber industry in Texas practically doubled as far as the number of persons engaged in the industry and the value of the product

⁶ For statutes herein referred to, see *Civil Statutes*, 1897, 2: 1955, 1966, 1972, and 1976; also *Laws of Texas*, 1905, p. 159.

⁷ This estimate is compiled from Bray, W. L., *Forest Resources of Texas*, Bulletin of the United States Forestry Bureau, No. 47, 1904, pp. 20-24, as follows:

Longleaf Forests of the Fayette Prairie.....	5,000 sq. miles
Loblolly Pine and Hardwood Forests of Interior Coast Plain.....	7,000 sq. miles
Hardwood and Shortleaf Forests of Lignitic Belt....	30,000 sq. miles
Total	42,000 sq. miles

⁸ *Ibid.*, p. 37.

⁹ United States *Census Reports*, 1910, 8: 614; the corresponding figures for 1900 were as follows:

Number of establishments.....	559
Average number of wage earners.....	12,455
Value of the product.....	\$17,782,000

were concerned. Moreover, the quantity of standing timber, if properly cared for, is said to be sufficient to support these establishments for many years and to yield large profits, both to private owners and to the state, if it is not wasted before the market for lumber is fully developed.

In spite of this fact the value of the timber lands in Texas, as such, is being rapidly destroyed and the timber on them wasted. This condition is due to the fact that the soil is so rich and the land so valuable for agricultural purposes that field after field of "unsurpassed forest" is being deadened and destroyed merely to get rid of the trees.¹⁰ The general usefulness of the timber lands is also being greatly diminished because those communities which are dependent upon standing timber for their water supply and protection against floods and silt are exposed to immense losses on account of the removal and destruction of the forests by private land owners. This wasteful and destructive process has been carried on so long that unless certain forces now at work impoverishing the resources of the state are restrained, conditions will soon prevail which will necessitate remedial measures at a very heavy public expense.¹¹

Originally the state of Texas owned all the timber lands within its borders, except a very small number of acres which had been patented to private owners prior to its annexation. Ninety-five per cent of these lands are now private property.¹² The income which the state might have derived from a judicious transfer of this property can hardly be estimated at this time, but the income which it did obtain from them is comparatively insignificant because most of these lands were disposed of as agricultural lands. Even timbered school lands were frequently sold "at prices if not fixed, at least suggested by the purchaser,"¹³ and, consequently, for much less than their market value. The land commissioner says there cannot be any question but that the pursuance of this policy has cost the school fund "many, many millions of dollars."¹⁴ Much of the timber is also reported to have been stolen from the school lands.

¹⁰ See Appendix III, I.

¹¹ See Appendix III, m.

¹² *Ibid.*, p. 37.

¹³ Commissioner of the General Land Office. *Biennial Report*, 1904, p. 9.

¹⁴ *Ibid.*

To obtain the market value of its timber lands and to prescribe such conditions in their transfer as would prevent destruction and insure the intelligent use of the timber, if not the reforestation of the lands, should have been the essential features of the state's policy in disposing of them. Neither of these purposes, however, was accomplished. The policy was deficient, therefore, insofar as it permitted private owners to acquire these lands without making a commensurate return for them to the public treasury. It was also incomprehensive insofar as it failed to prevent waste of the forests and protect the future value, not only of the forest lands, but also of the surrounding agricultural lands.

MINERAL LANDS

Under the laws of Spain, minerals were the property of the sovereign and minute regulations were established in order to encourage their development by private enterprise and to secure the payment of a tribute for the privilege of operating the mines.¹⁵ Mexico also tenaciously adhered to this policy and endeavored to dispose of its mineral rights in such a way as to make them a source of revenue. The national colonization law provided that settlers should be free to promote any kind of industry; that they should be permitted to work mines of every description, but that they should make agreements with the national executive in regard to those mines which pertained to the national revenue, and that they should subject themselves in working the others to the ordinances and duties that were then or might thereafter be established in regard to the business of mining.

An illustration of the way in which Mexico disposed of its mines and mineral rights is found in the franchise granted to J. L. Woodbury and John Cameron. These men were given an exclusive privilege in 1828 to work the iron and coal mines in the state of Coahuila and Texas for a period of twenty-three years and all other persons were prohibited from working such mines without their permission, except those whose mines had

¹⁵ Sayles, *Real Estate Laws of Texas*, 1: 436.

been discovered and legally specified and proclaimed before the promulgation of this decree.¹⁶ The franchise carried with it the privilege of introducing professional artisans for the purpose of smelting and separating the metal, but it required the grantees to prefer the natives of the country for common mining laborers. They were also required under penalty of forfeiture of their contract to have introduced the machinery and necessary utensils, and to have erected within a period of three years from the date of the franchise, in at least one of the departments of the state, the proper buildings for working and "elaborating" the iron. In addition to this, they were restrained from selling iron of superior quality and of no regular shape in the state at a price exceeding five-eighths of a rial a pound, but no special royalties, taxes, or obligations other than those already established in the mining ordinances were imposed upon them.

Since Mexico had so carefully reserved and protected its mines and mineral rights as property of the government, Texas came into full possession of all those within its borders at the time it gained its independence from Mexico. It also adhered to the policy of the Spanish and Mexican governments for more than thirty years and continued the reservations that had been previously made, but does not seem to have done much during that period to encourage the development of the mines or to have secured any benefit from the use of its mineral rights. As previously stated, in 1840 the common law of England was made the rule of decision in the Republic of Texas and the same act which adopted the common law also repealed the Mexican laws previously in force in the Republic except those which related exclusively to grants and the colonization of lands in the state of Coahuila and Texas and such other laws as related to the reservation of salt-lakes, lies and salt-springs and to mines and minerals of every description.¹⁷ Since all the laws in force in the Republic of Texas prior to annexation remained operative until they expired by their own limitation or were repealed,¹⁸ the

¹⁶ *Laws and Decrees of Coahuila and Texas*, p. 98.

¹⁷ See copy of the act in note on page 20.

¹⁸ *Constitution of 1845*, Art. XIII, Section 3; Paschal, *Digest of the Laws of Texas*, p. 72.

mineral wealth of the community was thus reserved to the state until it was subsequently released to the owners of the soil. This did not mean that a private holder could not acquire title in fee to land on which minerals might be known then, or later be found, to exist; but it did mean that title to the lands did not carry with it a right to the minerals that might be found in them.

This very question came up for judicial determination in 1862, twenty-five years after the law had been passed which made these reservations. It was contended that all lands containing minerals were separated from the mass of the public domain and were thereby withdrawn from individual appropriation by the location on them of any kind of certificate or claim to land. But the Supreme Court through Justice Moore denied the validity of this contention.¹⁹ It was held that the object and purpose of the legislature was simply to reserve to the Republic the salt-springs, gold and silver mines, copper, lead and other minerals; and that while the mineral resources of the country that were then known to exist, or that might afterwards be developed, were thereby secured to the government, no embarrassment was placed in the way of a citizen in acquiring a fee in the quantum of the land to which his certificate or scrip entitled him. But such a reservation carries with it the right of the state or any of its agents to enter upon lands located by individuals in which minerals may be found, and to dig for and to carry them away and all other such incidents as are necessary to make the reservation available to the state. The court said it thought it was evident that the legislature intended to do nothing more than to secure by an express reservation the same right to all minerals, when it granted land, that was by the common law impliedly reserved to the King as to royal mines, and it quoted Rockwell's *Spanish and Mexican Law* to the effect

"That a property may be acquired in mines which will be quite independent of the property in the lands in which they are situated. In this condition, the minerals, of whatever character they may be, will, of course, still form parts of the land itself and will constitute land in strictly legal acceptance."²⁰

¹⁹ *Cowan v. Hardeman*, 26 Texas, 217, 1862.

²⁰ *Ibid.*, p. 223.

Chief Justice Wheeler, in giving a concurring opinion in this case, said that these reservations afford evidences of the carefulness of the legislature to guard the interests of the state in her islands, salt springs and minerals, and the fact that the reservation was not annihilated by the repealing section of the act which adopted the common law of England, manifests "a settled policy and purpose on the part of the legislature to protect the interest of the state in the enumerated objects and to guard against their appropriation to the purposes of private speculation."²¹ In discussing the relation that existed between the owner of the land and the state and the right of the state to enter upon the land of a private owner in order to develop or use its mineral resources, he also said:

"We hold that the patent is not absolutely and necessarily void because there is found to be a salt spring or minerals upon the land embraced within the grant. And not being void, it can not be impeached and avoided by a mere intruder. Insofar as concerns the use, it may, however, be avoided in part or in whole by the state in the exercise of its reserved right in the salt-spring or minerals embraced within it. The state must have the easement of going upon the land for this purpose; and if to the full enjoyment of the right of the state, it should become necessary to use the whole of the land, timber and water upon the tract, the right of the state to an easement to that extent can not, I apprehend, be questioned."²²

Within four years after the decision in the case of *Cowan v. Hardeman* had been rendered, all mines, minerals, salines, oil springs and wells and all precious metals or minerals were declared by constitutional enactment to be the property of the rightful owner of the land on which the same might be situated and subject to such uniform rates of taxation as the legislature might impose.²³ A similar provision releasing to the owner of the soil all mines or minerals that may be on the same, subject to taxation as other property, is contained in the present constitution of the state.²⁴ Consequently, the state has had no di-

²¹ *Ibid.*, p. 224.

²² *Ibid.*, p. 224.

²³ *Constitution of Texas, as amended, 1866*, Ordinance Number XV, *Paschal, Digest of the Laws of Texas*, p. 952.

²⁴ *Constitution of 1876*, Art. 14, Sec. 7; *Civil Statutes, 1897*, 2: 1445.

rect control over any of the minerals within its borders since 1876 except such as might be found on the public school, university or asylum lands.

In this way all the mineral wealth of the state, except that contained in its reserved lands, passed, as by the mere stroke of a pen, into the hands of private owners without the payment of one cent of compensation or royalty. Such a transfer was a remarkable piece of legislation. But it was enacted as a constitutional provision, and, therefore, had the sanction of the people. The release of practically all future rights to minerals within the state without any compensation, and especially when great care had been exercised for years to preserve them indicates a radical change of sentiment for which it is difficult to assign a reason. It can apparently be explained only on the ground that the people generally believed that such a policy would encourage the development of the mineral wealth and that future taxation would yield a greater income than the reservation of mineral rights had done. Since 1876 mineral lands belonging to the school fund have been sold for \$57,368 in cash and notes.²⁵ Consequently, the transfer of mineral rights and lands to private owners has not been an important source of general income to the public treasury. But the value of the mines and quarries assessed as real property in 1900 was \$7,017,182 which was equivalent to practically one-fourth of the value of the land and buildings of manufactories assessed for the same purpose. Products valued at \$267,603,708 were taken from Texas mines during the period 1892 to 1913.²⁶ Doubtless more may be expected in the future, therefore, in the way of public income from this source than has been realized in the past.

Nothing whatsoever was done in the way of disposing of the minerals on reserved lands until 1883. At this time the school land board, which had been authorized to sell and lease these lands, was also authorized in a separate act to control and manage the disposition and use of minerals that might be found in

²⁵ Commissioners of the General Land Office, *Biennial Reports*, 1904, p. 9, and 1906, p. 15.

²⁶ United States Census Reports, *Wealth, Debt and Taxation*, 1907, p. 17. See also Scott, *op. cit.* 107-116.

them.²⁷ The minerals were reserved from the operation of laws designed for the sale and lease of the surface land, and the board was directed to dispose of them for the benefit of the funds to which the land belonged.

The reservation of "all minerals" from the operation of laws providing for the sale and lease of reserved lands contained in the law of 1883 was afterwards changed to a reservation of "all public lands containing valuable mineral deposits" and the Geological and Mineralogical Survey was directed to designate such tracts as were apparently mineral bearing. The courts have since declared that the reservation of 1883 was impliedly repealed by this change in the law and that a locator on land since that time is not subject to laws reserving minerals to the state unless the land was designated as mineral land.²⁸ The Commissioner has power to change the classification of land from grazing or agricultural to mineral; but if the land has been purchased while it is classified as grazing or agricultural, the purchaser is entitled to all the minerals that may be found in it.²⁹ Lands which are now classified as mineral lands may be sold for grazing or agricultural purposes, but all sales of such lands are made upon the express condition that the minerals shall be reserved to the fund to which the land belongs.³⁰

According to the law of 1883, owners of mining rights were permitted to work mines for their own benefit, but they were required to pay the state five per cent of the gross receipts from such operations.³¹ They were also required to work the mines according to the regulations which the school land board prescribed, to do \$200 worth of work on them each year, and to furnish proof of the same under penalty of forfeiture. The school land board was abolished, however, in 1887 and all previous laws relating to the sale and lease of reserved lands were repealed.³² Owing to the suspension of the authority of the school land board, the mining laws, since they had been enacted

²⁷ *Laws of Texas*, 1883, p. 100.

²⁸ *Heil v. Martin*, 70 S. W., 430, 1902.

²⁹ *Colquit, Tigner Mining Co. v. Rogan*, 68 S. W. 154, 1902; also *Schendell v. Rogan*, 63 S. W. 1001, 1901.

³⁰ *Laws of Texas*, 1907, p. 495.

³¹ *Laws of Texas*, 1883, p. 100.

³² *Ibid.*, 1887, p. 83.

in separate acts, were in a state of great confusion, and, consequently, two years later the legislature passed a law "to promote the development of the mining resources of the state."³³ The plan embodied in it was designed to realize an income to the school fund of \$50 a year from each mine claim regardless of the amount of mineral obtained from it. Any time within five years after the mining claim had been secured the owner might obtain a patent for it by paying the purchase price fixed by law which varied from ten to twenty-five dollars an acre according to the kind of ore that was being mined and the distance of the mine from a railroad.

In 1895 all former plans were abandoned and the legislature at this time passed a law intended "*to better and more fully promote* the development of the mining resources of the state."³⁴ The annual tax of \$50 was removed and any individual or corporation was permitted to secure a claim to mineral lands varying in size from twenty-one to six hundred and forty acres according to the kind of mineral obtained. The claimant was protected in his right to work the mine for five years and dispose of its product for his own benefit without the payment of one cent for the privilege. If by the end of that time he considered the mine a valuable one, he could obtain a patent for it by the payment of not more than \$25 an acre for the land. In addition to this, a credit of ten years with interest at four per cent was extended to him on this sum. If the good qualities of this law are to be determined by the amount of revenue which it brought into the school fund, it can not be said to have been well suited to the purposes it was designed to accomplish. The commissioner of the general land office says it should have been entitled "An Act to authorize persons to rob our public free school fund at their own pleasure," for such were largely its results.³⁵

In this way the whole basis for deriving a revenue from the mineral wealth in the lands reserved for the benefit of the free school and other public funds was changed from that of a five

³³ *Ibid.*, 1889, p. 116.

³⁴ *Ibid.*, 1895, p. 197.

³⁵ Commissioner of the General Land Office, *Biennial Report*, 1904, p. 9.

per cent gross-receipts tax at one time, and an annual tax of fifty dollars on each claim at another, to one from which the state derived no benefit whatsoever unless the owner of the claim saw fit to secure a patent for the land for which he paid, in many instances, a ridiculously low price in comparison with the value of the ore that was being obtained from the mine.

The mining statutes, therefore, have been almost a complete failure as far as the question of obtaining an income for the school fund is concerned. The reports of the general land office show that 1,931 applications for mining claims were made for all classes of metals during the first twenty-one years after the passage of the law of 1883 and that 1,595 of these applications were accepted.³⁶ There were 937 final purchase applications made from these claims, of which only 427 were in good standing in 1904. The net result is that 39 claims had been patented by September 1, 1904, for which the school fund received only \$17,972. The Commissioner also says that he is informed on good authority that one section of land in Brewster county, adjoining a school section, was sold for \$125,000; also that during the year 1902 the total production of quicksilver in the Terlingua district was 5,319 flasks which, at \$45 a flask, was valued at \$239,355. Consequently, it is conclusively shown that the value of the net output of one ore in one district during only one year was more than thirteen times the total amount that had been realized by the state from all its mineral wealth in twenty-one years.

One reason for the failure of the mining statutes, which is of no little importance, is found in the fact that the Geological Survey did not proceed to examine and classify the mineral lands except in El Paso, Jeff Davis and Presidio counties, as it was directed to do in the law of 1889.³⁷ Its failure was due to the fact that the survey was not to proceed until after a map had been prepared by the Commissioner of the General Land Office which should show the location of all public school, university and asylum lands. This map was never prepared, for the

³⁶ *Ibid.*

³⁷ Phillips, W. B., *The Mining Laws of Texas*, Bulletin of the University of Texas, No. 21, 1903, pp. 18-19.

legislature failed to appropriate the money to cover the expenses of preparation. Moreover, the Survey itself ceased to exist after 1892 because appropriations for its maintenance were also withheld. After the discontinuance of the Survey, no state authority existed for examining and classifying lands as mineral bearing. Consequently, the classifications contemplated by the law of 1889 which "was unquestionably designed for the purpose of bringing a revenue to the state from mineral lands" were never made. This sort of shiftlessness is typical of the general lack of interest which the successive legislatures of Texas have displayed in the development of the mineral resources of the state.

Another reason for this failure is the fact that an operator could work a mine five years under the law of 1895 and dispose of the whole product for his own benefit without paying one cent into the public treasury. It will be sufficient at this point, however, to say that the legislature in 1905 amended the law so that no man could thereafter work a mine for five years, extract all the valuable ore from it, and then forfeit the empty mine to the state without compensating the school fund.³⁸ The claimant has since been required to make a cash payment each year, together with the interest on the deferred principal. Since the passage of this act, the school fund has received \$39,396 in cash and notes which is more than double the *total amount* received from the sale of mineral lands during the twenty-one years preceding September 1, 1904.³⁹

It has been alleged that insecurity of mineral land ownership and inability of mining laws to protect the industry have also been a reason for the slow progress which this industry has made in Texas, and hence the insignificance of the revenue derived therefrom. A comparison of these laws with the similar ones of the United States, however, has been made by a mining engineer and it is confidently asserted that they "afford sufficient protection to the mining industry."⁴⁰ There are very few differences between the mining laws of Texas and those of the United States

³⁸ *Laws of Texas*, 1905, 159.

³⁹ Commissioner of the General Land Office, *Biennial Report*, 1906, p. 14; and 1908, p. 15.

⁴⁰ Phillips, W. B., *The Mining Laws of Texas*, Bulletin of the University of Texas, No. 21, 1903, p. 25.

and these are said to be almost invariably in favor of the prospector and miner. "Where they [laws of Texas] fail to afford protection it is to the State, not to the operator."⁴¹

The apparent policy of the state in regard to its minerals has evidently been one of *laissez-faire*. It has been fittingly expressed by a resident of one of the principal mining districts, in the following language:⁴²

"Let the state pursue a liberal policy toward the prospector, the miner, and the actual settler, whether he be a farmer or stock raiser, in the disposition of her mineral and other school lands, and she may safely depend, in a large measure, upon them to discover and develop whatever natural resources such lands may possess. If they possess any, the State will be amply compensated in the more rapid development and settling of the country, the increase of taxable values, etc., for whatever she may suffer in the low price she has received for the land, or in her failure to secure a royalty upon the minerals taken out, just as the United States government has been more than compensated for the low price she has obtained from her mineral lands by the rapid development of a number of the western states and territories."

The disastrous effect of this *laissez-faire* policy, as applied to private ownership of timber lands in Texas has already been seen. There is no evidence to show that private exploitation of the mineral resources has been attended by the same destructive and wasteful consequences. But it is already a debatable question in the minds of many and is vigorously asserted by others that the pursuit of such a policy by the federal government has not been so advantageous as it was long supposed to be. At any rate it would seem to behoove the state to look well toward the future disposition of such mineral wealth as it still possesses.

⁴¹ *Ibid.*

⁴² Quoted by Phillips, W. B., in *Mining Laws of Texas*, Bulletin of the University of Texas, No. 21, 1903, p. 29.

CHAPTER VII

LAND GRANTS FOR EDUCATIONAL AND ELEEMOSY-
NARY INSTITUTIONS (Concluded)

PERMANENT FUNDS

Under all the various laws enacted for this purpose approximately 52,000,000 acres of land have been appropriated to permanent funds. These lands include more than 70,000 square miles, an area larger than that of the whole state of Missouri and almost equal to the area of Ohio and Indiana combined. In comparison with the public institutions of other states, those of Texas have been magnificently endowed. California, for instance, received 6,719,324 acres from the United States in its donation of sections 16 and 36 and this was the largest grant of land that has ever been held by any state other than Texas for public school purposes. But the state and county public school funds in Texas have received more than 49,000,000 acres of land, a land endowment which is nearly seven times as large as that ever held by any other state. Moreover, the university, with its more than 2,000,000 acres is equally well provided for. The following table shows the distribution of lands among the various funds:¹

TABLE I.—SHOWING APPROPRIATIONS OF SCHOOL LANDS IN
TEXAS

Public school lands granted to the state fund	45,000,000 acres
Public school lands granted to counties.....	4,229,166 acres
Lands granted to the university.....	2,289,225 acres
Lands granted to asylums.....	400,000 acres
Total.....	51,918,391 acres

¹ The foregoing table has been compiled from the *Reports of the General Land Office* for 1902 (page 37) and for 1910 (page 30).

The funds which have been built up from the sale of reserved lands, apart from those appropriated to counties for public school purposes, amounted to \$69,791,908.27 in 1914. In addition to this, there are still more than 4,000,000 acres of unsold land belonging to these funds which is yielding an annual rental of from three to eight cents an acre. Of this amount the public schools had \$66,700,267.79 in cash and securities belonging to the state permanent fund and 1,847,445 acres of unsold land. The estimated income due to this fund August 31, 1914, from interest and rents was \$2,189,650.77.

Similarly the university had a permanent fund in 1908 of \$652,653.08 in cash and securities and 2,072,225 acres of unsold land under lease.² An accurate statement of the total amount of the cash and securities that have been derived from the sale of county school lands cannot be made at this time because the reports of the various counties are not available for this purpose.

INVESTMENT OF PERMANENT FUNDS

The first investments of permanent funds were made in railway bonds which gave the state a lien on all the physical property of the company as security for the loan.³ These investments were made as much for the purpose of assisting the railway companies as for that of obtaining a safe investment of the money and a regular income to the fund. During the first period of railway building in Texas, especially from 1852 to 1860, when the railway companies were hard pressed for a sufficient amount of cash with which to purchase ties, rails and rolling stock, the state had a school fund amounting to more than \$2,000,000 which was lying idle in its treasury and was awaiting some form of productive investment. People generally believed that its successful use as capital by the railway companies would greatly increase the wealth and power of the state, and consequently the proposal to lend it to these companies met with favorable consideration.⁴

² State Treasurer, *Annual Report*, 1908, p. 35.

³ Sayles, *Early Laws of Texas*, 2: 378 and 419.

⁴ Potts, Charles S., *Railroad Transportation in Texas*, Bulletin of the University of Texas, No. 119, 1909, pp. 89-90.

But soon after \$1,816,000 had been lent in this way, the Civil War came on and handicapped the railway companies so that they were not able either to complete their roads or to make any payments of principle or interest for nearly fifteen years after the first loans were made. Indeed, the complete loss of all this loan to the railway companies seemed so inevitable that the state took charge of the property of one company and sold it at auction. Satisfactory settlements, however, were made with the other companies by the payment of interest thereafter as it became due. By 1892 the state had received \$3,102,000 in principal and interest from these loans and other amounts were still due.⁵ At the present time, \$1,603,317 of the permanent school fund is lent on railway bonds.⁶ This sum doubtless represents, approximately at least, what is left of the principal that was originally lent to railway companies, for no subsequent laws have been passed which authorized an investment in railway bonds.

A vast difference of opinion exists in Texas in regard to the advisability and success of this loan to railway companies. By some it has been condemned as a "miserable failure," incurring an enormous loss to the school fund, while by others these railway bonds are said to be the most satisfactory of all classes of either public or private securities. Governor Hogg extolled their merits in the following language:⁷

"With the wreck of war involving the desolation of homes, waste of fortunes and repudiation of public and private obligations, there were few or no securities that survived, except these very railway bonds in which the school fund had been invested. There was less loss to the school fund from that investment than from any other security either public or private known to the authorities of the State."

In his campaign for re-election for governor in 1900 he recommended the passage of a law authorizing an investment of school funds in railway bonds.

In 1870 an act was passed which authorized the investment of \$60,258.61, then in the treasury, in United States bonds and

⁵ *Ibid.*, p. 91.

⁶ State Treasurer, *Annual Report*, 1914, p. 35.

⁷ Quoted by Potts, Charles S., in *Railroad Transportation in Texas*, Bulletin of the University of Texas, No. 119, 1909, p. 91.

the following year a general law was passed which required the comptroller of public accounts to invest the principal of the perpetual school fund in United States bonds as fast as it was received in the treasury.⁸ But in 1876 a board of school commissioners, consisting of the governor, comptroller and secretary of state, was created and directed to dispose of the United States bonds then in the treasury to the credit of the school fund and to invest the proceeds in bonds of the state of Texas.⁹ This board was also directed to collect the interest due thereon from the state semiannually and place it to the credit of the available school fund. In 1885 the emergency clause of an act which authorized investments in county bonds and prescribed the manner in which they should be made recited that prior to that time there had been no statute regulating the investment of the public school and other funds, but nevertheless county bonds and other securities were being purchased with them.¹⁰ With the exception of an act authorizing the investment of university funds in state bonds, no other legal regulation of investments was enacted until 1901.¹¹ At this time the board of education was authorized by general law to invest the permanent school fund in bonds of the United States, of the state of Texas or any of its counties, cities or independent school districts. A minimum rate of interest was fixed at 3 per cent and investments in any class of legalized public security other than state or United States bonds was forbidden when the indebtedness of the county, city or independent school district exceeded 7 per cent of its assessed valuation. By far the largest and most important investments, however, have been made in land notes which are merely evidences of the credit that has been extended to the settlers who purchased the land. These investments, of course, were authorized by the laws providing for the sale of reserved lands.

The amount of permanent funds and the kinds of securities in which they were invested in 1908, together with the number

⁸ Sayles, *Early Laws of Texas*, 3: 30 and 117.

⁹ *Ibid.*, p. 379.

¹⁰ *Laws of Texas*, 1885, p. 40.

¹¹ *Laws of Texas*, 1889, p. 81; also for 1901, p. 312.

of acres of unsold lands under lease belonging to each is shown in the following table:

TABLE II.—SHOWING INVESTMENT OF SCHOOL FUNDS, 1908

Form of Investment	State Permanent School Fund	University Fund	Asylum Funds
Cash on hand uninvested ..	\$67,956.11	\$1,021.66	\$34,462.37
City and Independent school district bonds	3,112,361.53	.....	.....
County bonds.....	7,583,929.00	.....	.....
State bonds	2,687,200.00	604,400.00	352,400.00
Penitentiary Railroad bonds	150,000.00	.....	.....
Railroad bonds	1,603,317.00	.....	.....
Land notes.....	38,406,222.51	47,231.42	213,022.10
Total.....	\$53,610,986.56	\$652,653.08	\$599,884.47
Number of acres of land under lease.....	3,957,628.30	2,072,225	.....

The state of Texas has been remarkably fortunate in the investment of its permanent funds. Some other states have been more successful than Texas in obtaining the market value of their reserved lands and in building up a much larger fund in proportion to the amount of lands at their disposal, but Texas has been exceptionally free from those heavy losses due to financial disturbances, insecure investments and to irresponsible and inexperienced officials which have so frequently diminished the funds of other states to a small fraction of their original amount. In addition to the security of its investments, most of them are paying at least five per cent interest and none less than three per cent. The investments in land notes are perfectly safe, yielding a good return in interest, and as capital are assisting in the development of rural communities. The same may be said of the comparatively small amount invested in railway bonds. None of the funds is invested in United States bonds at this time, which, although authorized by law and always secure, yield but a very small income. A very small portion is invested in state bonds. This method of investment is objectionable because it is only a disguised system of taxation for the support

of the schools. The money is borrowed from the school fund and spent for other purposes. It thus becomes an "irreducible state debt" for which taxes are levied to pay interest into the school fund. The investment in county, city and school district bonds is probably the best kind of investment that can be made. Mr. George Knight, who has made a special study of lands for education in the Northwest Territory, makes the following favorable comment on this class of securities:¹²

"This plan of investment in municipal and other public bonds seems to present fewer objections than any other. The time can hardly come when good public securities can not be found and purchased. Such bonds, while often bearing low rates of interest, are almost absolutely safe and require no care or labor on the part of the state."

THE SCHOOL LAND POLICY

The general policy of Texas in reference to its school lands has been to sell them to actual settlers for a minimum price fixed by law and to invest the proceeds in interest-bearing securities of both a private and public nature. The sentiment in the state, however, has wobbled from time to time between a plan of selling at a price fixed by competitive bidding and that of a minimum price fixed by law. It has also wavered even in its attempt to maintain this minimum price at a point somewhere near the actual market value of the land. Generally speaking, the difficulties to be encountered in such an undertaking are apparent; and in Texas their full force was brought into operation so that the minimum price fixed by law, which frequently was much below the market value of the land, really became the maximum price for which the land was sold. As a result, land speculators have reaped an abundant harvest, much to the detriment of the school fund. The laws providing for the sale of the school lands have been supplemented by a system of leasing whereby the state has endeavored to secure some return to the school fund from the use of these lands, usually in large tracts for grazing purposes, until there was a real demand for them by actual settlers.

Since the leasing system originally was only a temporary de-

¹² Knight, George W., *Land Grants for Education in the Northwest Territory*, Publications of the American Historical Association, 1: 185.

vice intended to supplement the income to the permanent funds derived from the sale of reserved lands, its importance has gradually diminished until, as a feature of the school land policy, it was abandoned in 1905.¹³ Since that time, whenever a lease has expired or has been cancelled, the land cannot be leased again within ninety days from the termination of the former lease and then not at all if there is a demand for it by purchasers. A constant agitation was maintained against the policy of leasing reserved lands on the ground that it fostered a system of state landlordism which could not be justified in any way;¹⁴ but the rise in land values to a point where the use of land wholly for grazing purposes is no longer profitable, and the consequent breaking up of the large cattle ranches in order to make room for the homesteader is responsible more than any other cause for the decline in the use of the leasing system and the ultimate elimination of this feature from the school land policy.

Twenty years ago it was estimated that the proceeds from the sale of Texas school lands would create a permanent fund of more than \$100,000,000.¹⁵ This was a reasonable expectation inasmuch as it was based upon the contemplated sale of the unsold lands classified as agricultural and grazing lands at the minimum price fixed by law. Moreover, this price was less than half the average value of Texas farm lands as reported in the United States census of 1900. If the value of the large number of timber and mineral lands which belonged to this fund had been taken into consideration, the estimate would have considerably exceeded \$100,000,000. But a statement of the cash, securities and unsold land belonging to the fund at the present time shows that the state has fallen far short in realizing its expectations in this particular. If a conservative estimate of the value of the unsold lands, based upon the average price for which they have been selling during the past few years, be added to the amount of cash and securities now in the treasury, it will be seen that the school fund will never exceed \$70,000,000. In fact, it will probably never reach this amount for none but the

¹³ *Laws of Texas*, 1905, p. 159.

¹⁴ Brackenridge, Maj. John T., *Evils of State Landlordism*, *Texas Review*, 1: 475 (April 1886).

¹⁵ Commissioner of the General Land Office, *Biennial Report*, 1902, p. 55.

very poorest lands remain to be sold. If the present value of the unsold lands has not been overestimated, the state has secured in productive funds but little more than one-half, and at most, not more than three-fourths, of the total amount which it ought to have had according to estimate. Since the state did not receive the market value of its timber and mineral lands when it disposed of them, the deficit in the school fund is correspondingly that much greater.

The deficit in the permanent funds of Texas is due to the failure of the state to sell its reserved lands for their actual market value. An average price of \$1.37 an acre has been received for those which were sold prior to 1908. Nearly one-half of them were sold for a minimum price of approximately \$1 an acre fixed by law at a time when the average value of all the farm lands in Texas assessed for taxation was \$5.56 an acre; and when North Dakota was selling its school lands out of sections 16 and 36, granted by federal government, at an average price of \$14.74 an acre.¹⁶ During the same period from 1891 to 1908, South Dakota sold 309,528 acres out of the grants of sections 16 and 36 for \$5,043,036.51, an average price of \$16.30 an acre.¹⁷ The same inability of the legislature to deal with this problem as a business proposition also manifested itself in the disposition that was made of the timber and mineral lands whereby millions of dollars were lost to the permanent funds of the state. Indeed, the legislature of Texas has not won many laurels for itself while acting in a business capacity as the administrator and custodian of the school fund. Under the guise of providing homes for the homeless and of encouraging actual settlers to occupy the vacant domain it permitted the valuable agricultural, timber and mineral lands, set apart for the benefit of the school children, to slip into the hands of bonus hunters, land grabbers and speculators. If the same care and ability had been displayed in the sale of reserved lands that was afterwards exercised in the investment of the proceeds from them, it is safe

¹⁶ Commissioner of University and School Lands, North Dakota, *Eighth Biennial Report*, 1908, p. 17.

¹⁷ Commissioner of School and Public Lands, South Dakota, *Tenth Biennial Report*, 1908, p. 4.

to say that the permanent funds would be at least fifty per cent larger than they are at present.

The history of land grants for education in the various states is full of accounts of squandered lands, poor investments and misapplied and embezzled proceeds. Twelve states received a grant of land for school purposes from the federal government, consisting of the sixteenth section in every township. This grant was equivalent to an appropriation of from 600,000 to over 1,000,000 acres for each state. Only two states, however, have state school funds derived from any source at the present time which exceed a ratio of 5 dollars to 1 for the number of acres of land received. In the fifteen western states that received two sections in each township, which was equivalent to a grant of land varying from two to six million acres for each state, not one has a permanent school fund which shows a ratio of 5 dollars to 1 for the number of acres of land received. In fact only two exceed the ratio of 2 dollars to 1. The ratio of the permanent school fund in Texas to the number of acres of school land appropriated is 1.3 dollars to 1. If particular instances be considered, Ohio and Missouri are found to have disposed of their lands for much less than their market value and to have invested the proceeds in an irreducible state debt so that a permanent tax is levied upon the present and succeeding generations to pay interest on this debt and for the support of the public schools. In Illinois the lands were not only disposed of before there was a real market for them but what little proceeds were derived were actually used for other purposes than that for which the lands were appropriated. Michigan sold a large portion of its school lands at the rate of \$8 an acre, and then permitted a revaluation of these lands so that the purchaser obtained a patent for them at a price much less than he voluntarily offered. An irresponsible state treasurer embezzled over \$300,000 of the school fund in Nebraska and tried to make retribution for his misuse of this money by serving four and one-half years in the state penitentiary. Kansas sold its school lands in an early day and invested the proceeds in county bonds of "western counties that have long since been given back again

to the supremacy of the prairie dog.”¹⁸ A further enumeration of particular instances would only be a tedious reiteration of facts. It is sufficient at this point merely to add that although Texas has escaped many of the difficulties which other states have encountered in administering their funds, the inability which it has displayed to create a fund out of the means at its disposal has not been overshadowed by that of any other state in the union.

A good test to apply to the Texas school land policy is that of the average amount of school taxes paid per capita of the whole population. This is an especially suitable test in this case because one of the avowed objects in launching and maintaining such a policy was to avoid taxation. Perhaps the most satisfactory and desirable comparison that can be made is with the so-called “land grant states” of the federal government.

Texas has succeeded in keeping the average tax rate for each individual down to a very low figure. Whether or not this figure is as low as it should be, considering the size and the value of the land endowment, is open to question. Whether or not the Texas school system is as good as that of other states that are deriving a larger portion of their support from state and local taxation is also a matter for very serious consideration.

The Texas land endowment (52,000,000 acres) is more than seven times as large as the largest grant received by any state from the federal government (California, 6,719,324 acres). The value of the fund derived from the sale of these lands in Texas is more than eight times as large as the California fund, six times as large as the South Dakota fund, and three times as large as the Minnesota fund, the principals for each of which were derived chiefly from the proceeds of the sale of the lands granted by the federal government. But the average per capita school tax in Texas is \$2.75; whereas in the states mentioned it is \$7.08, \$3.80 and \$5.80 respectively. Nominally \$2.75 per capita is a low rate of school tax, as a study of Table III will

¹⁸ The statements made in this paragraph are based upon Knight, George W., *Land Grants for Education in the Northwest Territory*, and Elder, F. S., *School Lands of Oklahoma*. See also Swift, F. H., *Permanent Common School Funds in the United States, 1795-1905*, pp. 272-3.

show, but even if Texas spent as much for each child of school age as the states mentioned above it would seem that the per capita tax should be much lower, especially when the size and value of the land endowment are considered.

Nevertheless the Texas school system is not officially regarded as being satisfactory or successful.¹⁹ State Superintendent Doughty has recently asserted that the school term is not more than two-thirds as long as it should be and that the schools lack the financial support necessary to equip them properly and maintain them satisfactorily. Although the returns from the school fund constitute less than one-fifth of the total revenue for school purposes they seem to prevent a satisfactory levy of taxes rather than to supplement the revenues derived from taxation. Contrary to the facts in the case, the people have seemed to believe that since they had the largest land endowment in the country, they *ipso facto* have the best supported school system. If the twenty-nine states that received land from the federal government and Texas be arranged in the order of the total expenditure from the highest to the lowest for each child of school age (5-18) (see Table III, column 1), Texas will be found to rank twenty-third on the list. While Texas spends \$11.32 for each child of school age, Oklahoma spends \$13.39; Kansas, \$24.25; Nebraska, \$26.44; South Dakota, \$23.76; North Dakota, \$30.56, and California \$47.86. Recognizing the seriousness of the problem and the necessity for increased taxation, the state superintendent of Texas officially recommends that the state and local levies be increased and that provision be made for a county levy. If a permanent fund has the same effect in Texas that similar funds have had in other states, it will eventually become an inducement for more liberal measures of taxation and for much more ample financial support of the schools.²⁰

¹⁹ Doughty, Supt. W. F., *Recommendations Regarding Public Education*, 1914, pp. 12-14.

²⁰ For a good account of the effects of permanent school funds see Swift, *op. cit.* pp. 160-203; particularly in regard to the effect on taxation, see pp. 197-8.

TABLE III.—COMPARATIVE EXPENDITURES PER CAPITA OF SCHOOL POPULATION, AGES 5 TO 18, YIELD OF SCHOOL FUNDS AND PER CAPITA TAX RATE IN LAND GRANT STATES, 1912-13

Sections	Average expenditure per capita (school population 5-18 years of age) (a)	No. of acres school land granted by U. S. Gov't (b)	Permanent common school funds (c)	Total amt. revenue derived from interest on funds and rents (d)	Proportion of total revenue derived from int. on funds and rents (d)	Total amt. revenue derived from state and local taxes (d)	Av. amt. state and local taxes per capita (total population) (f)
Section 16							
Alabama ----	\$5.29	902,744	\$2,053,209	\$165,832	4.44	\$3,229,166	\$1.51
Arkansas --	7.49	886,460	1,136,134	50,281	1.30	3,701,745	2.35
Florida ----	10.10	905,503	1,491,420	47,508	2.32	1,936,913	2.57
Illinois ----	23.88	985,066	1,047,409	830,401	2.45	31,999,723	5.67
Indiana ----	24.01	650,317	8,962,096	530,809	3.33	14,213,551	5.26
Iowa ----	25.06	705,144	4,803,196	200,000	1.41	12,902,898	5.79
Louisiana --	8.57	786,044	2,367,161	100,479	2.48	3,880,786	2.34
Michigan --	23.47	1,067,397	5,288,313	---	---	---	---
Missouri ----	16.91	1,199,139	3,159,281	812,650	5.65	13,569,172	4.12
Mississippi --	4.66	837,584	---	---	---	2,665,271	1.47
Ohio ----	24.90	704,488	3,524,528	255,994	.98	25,869,689	5.42
Wisconsin --	17.91	958,649	4,182,406	215,808	1.66	10,120,446	4.33

Sections 16
and 36

				(e)			
Arizona ---	\$24.24	4,050,347	\$7,569,745	\$379,009	2.14	\$16,849,804	\$7.08
California --	47.86	6,719,324	2,713,233	175,428	2.66	5,484,265	6.86
Colorado ---	32.55	3,715,555	2,446,278	259,949	8.93		
Idaho -----	30.96	3,068,231	9,394,704	478,356	3.69	12,468,304	7.37
Kansas -----	24.25	2,801,306	22,800,110	1,000,000	7.59	12,171,394	5.80
Minnesota ---	26.17	2,969,990	3,072,564	345,405	10.28	2,805,268	7.45
Montana ----	38.42	5,112,035	8,482,143	419,488	5.33	6,981,153	5.85
Nebraska ---	26.44	2,702,044	2,184,702	(e)		565,346	6.90
Nevada -----	42.02	3,985,428	50,112,154	102,478	11.06		
New Mexico---	10.76	4,309,368	8,068,982	1,461,159	27.63	3,598,816	6.23
North Dakota	30.56	2,306,717	6,456,357	1,161,964	16.90		
Oklahoma ---	13.39	2,050,375	6,252,549	354,366	6.05		
Oregon -----	38.00	3,329,706	10,223,349	767,005	23.33	2,222,435	3.80
South Dakota	23.76	2,063,234	1,784,510	(e)			
Utah -----	31.62	3,003,613	590,952	171,118	19.21		
Wyoming ----	30.59	3,480,281	8,964,667	700,000	6.67	7,464,588	6.53
Washington -	37.49	2,488,675	67,749,083	2,555,257	18.06	10,747,176	2.75
TEXAS -----	11.32	52,000,000					

a Data taken from U. S. Commissioner of Education, *Annual Report* 1913, 2:34.

b Except Texas.

c U. S. Census Bureau, *Wealth, Debt, and Taxation*, 1913, Vol. 1, Table 1.d U. S. Commissioner of Education, *op. cit.*, pp. 30-31.

e Included in returns for state and local taxes and therefore omitted here.

f Computed

CHAPTER VIII

THE PUBLIC LAND QUESTION IN TEXAS

THE PROBLEM OF LEGISLATION

Since land is one of the three requisites of production, the general problem in all land legislation is to secure and maintain its fair and equitable distribution among actual occupants so as to promote the general welfare of the whole community. The state in all its particular acts of legislation which either directly or indirectly affect the ownership of land tends either to approach this goal or to recede from it. The policy of the state may vary from time to time between that of encouraging large scale production on vast estates or small scale production on peasant farms; but whatever its attitude in this respect may be, the first essential of all land legislation should be to obtain definiteness and security of tenure. This quality having been obtained, the problem, whether the land be publicly or privately owned, becomes one of general policy in defining the attitude of the state with reference to its use.

As stated in preceding chapters, the state of Texas originally owned practically all the land within its borders. The most important phase of the land problem, therefore, has been the transfer of this land from public to private ownership; and since Texas had not the people within its borders to occupy and use its vacant domain, the legitimate and economic use of public land to encourage immigration was a vital subject in Texas politics for nearly half a century. Incidental and subsequent to this feature of the problem, its use as a source of public revenues and for the establishment of permanent funds has been a question of increasing importance. The manner in which these phases of the problem have been dealt with has been set forth

in other chapters. A few of the general characteristics of this legislation and the social aspects of the problem now demand our attention.

AMBIGUOUS LEGISLATION

The ambiguity, even incongruity, of the law providing for the location of land certificates during the early settlement of Texas resulted in an unwarrantable number of conflicting claims between individual settlers. The law as it existed prior to 1850 permitted locations to be made on any lands claimed to be held by prior grants and the holder under the prior grants might be forced into court at any time to prove the validity of his title.¹ Under such a system no landowner could foresee the time when he might not be summoned into court to defend his title against some alleged defect or be stripped of his property altogether. This unsettled condition of land titles was due to poor framing of the statutes, but it was productive of an unlimited amount of litigation, and the insecurity of ownership which it involved had very noticeable effects in the shrinkage of land values. It was a subject for frequent comment in governors' messages and caused Governor Bell in 1851 to admonish the legislature in the following terms:²

"There is nothing which so much retards the growth and prosperity of the country as the unsettled conditions of its land titles. This is an evil from which our state has greatly suffered; and though it has been partially removed by the adjudication of the courts, it is still a serious obstruction to her rapid advance in prosperity."

The looseness with which the statutes were framed also permitted colossal frauds to be perpetrated upon the state under the color of legal claims. By 1840 it had become so notorious, says one writer, that a large number of certificates had been fraudulently issued, some to persons not entitled to land, others to persons who were entitled, but for more land than they could legally claim.³ Thousands of acres were thus claimed under what was known as "eleven league claims," "border league

¹ Bell, Governor P. H., *Annual Message*, November 10, 1851.

² *Ibid.*

³ Sayles, *Real Estate Laws of Texas*, 1: 239.

claims," and "grants of premium lands," for all of which the state was forced into court in order to protect itself. Land certificates became an article of traffic by virtue of a provision in the law which made them assignable; but in consequence of the large number of fraudulent certificates in circulation which could not be distinguished from the genuine, their value was greatly depreciated. To limit this evil an act "to detect fraudulent certificates and to provide for issuing patents to regular claimants" was passed in 1840.⁴ This act created what were popularly known as traveling boards of land commissioners which were required to visit each county in the district assigned, inspect the records of the county boards, and ascertain by satisfactory evidence what certificates for land should be issued to legal claimants. After this, the patents were issued only on such certificates as had received the endorsement of these boards. The constitutionality of this act was attacked, but the act was sustained by the Supreme Court on the ground that certificates for land were imperfect obligations of the government which could not be enforced without its assent; and that the government, while it retained a share in the land, could establish, alter and modify the laws relating thereto from time to time as it deemed necessary in maturing an imperfect title into a perfect one.⁵ In addition to this, the state was involved in a whole series of acts to ascertain fraudulent entries, trespass to try titles and to quiet land titles in certain colonies.

The controversy which developed between the state and the railway companies over the interpretation of the railway grants is a good illustration of the difficulties which grew out of the lack of care in framing the statutes. In the lawsuits which followed, the state recovered nearly 1,500,000 acres from these companies. Most of the certificates for this land were not located with fraudulent intent, but the controversy arose because of a legitimate difference of opinion in regard to the meaning of the statute. The law of 1854 provided that sixteen sections of land should be donated for each mile of road, but that this land

⁴ Sayles, *Early Laws of Texas*, 1: 385.

⁵ For statement of this principle and citations to cases in which it was developed see Sayles, *Real Estate Laws of Texas*, 1: 239.

should not be granted "to any company for more than a single track road, with the necessary turn-outs." This sentence was the joker, and the amount of judicial verbiage required to interpret it fills a remarkable number of pages of the Texas court reports. The first case came up in 1891.⁶ The railway companies contended that sidetracks were "necessary turn-outs" and, therefore, they should be counted in computing the total mileage of the road as a basis for earnings of land. Moreover, it was asserted that the previous interpretation of the statutes had acknowledged such a computation. The court, however, decided that sidings, turn-outs, and switches were necessary parts of a well equipped railway, and held that the right to lands extended only to the number of miles of extension of completed road upon the line and not to side tracks.

Two notable lawsuits arose out of an effort to determine just how much of the public domain was actually appropriated to the school fund by the legislation that was enacted for that purpose. These cases are particularly significant here because they involve a direct gain or loss to the school fund of more than 16,000,000 acres of land and placed the validity of claims to land under the homestead law in jeopardy. But they are worthy of special emphasis because they set forth in concrete and unmistakable outline the absolutely certain consequences that follow legislative enactments which have not been carefully studied and constructed before they pass the legislature.

The Constitution stated that (Art. 7, Section 2)

"All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made *or that may hereafter be made* to railroads or other corporations of any nature whatsoever; *one-half of the public domain of the state*⁷ and all sums of money that may come to the state from the sale of any portion of the same, shall constitute a perpetual school fund."⁸

Twelve years later two questions were fully developed in regard to the meaning of this appropriation.

First. Did the Constitution appropriate to the school fund

⁶ *Galveston, etc., Ry. Co. v. State*, 81 Texas, 572, 1891, 17 S. W. 67.

⁷ The italics do not appear in the original text.

⁸ Revised Statutes, 1911, p. xlii.

an undivided one-half of the public domain as it existed in 1876 and such other alternate sections as might be included in grants that might be made to railway or other corporations from the remaining half? There were 67,961,277 acres in the vacant public domain at that time after 3,000,000 acres had been deducted for the capitol building and 1,000,000 acres for the university. It was said that 33,980,633 acres, one-half of the total amount, were appropriated to the school fund by the self-operating force of the constitution. Then if the foregoing question was answered in the affirmative, it was not contended that any more land would accrue to this fund unless grants of land were made to railway or other corporations. If so, then such grants were required to be made out of the one-half that remained after the foregoing appropriation was made and the school fund was entitled to each alternate section in such grant. If all the remainder of the vacant public domain were granted to corporations, then the school fund would conceivably be entitled to three-fourths of the public domain as it existed in 1876. This is the contention that was made by the Attorney-General, but the majority of the Court took the opposite view which will be stated in the succeeding paragraph.⁹ Chief Justice Stayton, however, submitted a very strong dissenting opinion which supported this view of the contention and which has many features that commend themselves more favorably to the reader for soundness of reason and clearness of thought and expression than the prevailing opinion.

Second. Did the constitution appropriate only one-half of the vacant public domain as it existed in 1876 to the school fund regardless of what might be done with the remaining half? There was no question but that 33,980,633 acres had been appropriated to that fund. The question was whether or not the alternate sections of grants that had been made to railroads since 1876 should be counted in making up this quantum of land. The contention of the state through the Attorney-General was that they should not be so counted but that they should have been added to the 33,980,633 acres to make up the total quantum

⁹ *Galveston, Harrisburg & San Antonio Ry. Co. v. State*, 77 Texas, 367, 1890.

to which the school fund was entitled. But the majority of the Supreme Court overruled his contention and answered the question in the affirmative. It was held that the people in framing the constitution did not intend to appropriate an undivided one-half of the vacant public domain to the school fund and in addition thereto the alternate sections of land granted to corporations. Such an appropriation would have stopped all locations on public land until after the school land had been segregated from the mass of public domain. There would have been no spot in the state unappropriated upon which to make locations. Until the school land had been segregated and clearly designated as such, no one could tell whether or not a particular piece of land desired was subject to location and occupation as private property under the homestead and other laws providing for such occupation. It was said that the object of the constitutional appropriation for the school fund was to prevent the legislature from disposing of more than one-half of the public domain for other purposes. It was the duty of the legislature to divide the public domain and dispose of it after all previously acquired rights had been satisfied, but that in such partition and disposition the constitutional provision would force the legislature to recognize the claim of the school fund to one-half of that amount.

In the case of *Hogue v. Baker*,¹⁰ the court consistently followed its holding in the former decision. This time, however, the decision was favorable to the contention of the state. An effort had been made through mandamus proceedings to force Baker, the land commissioner, to patent a piece of land claimed as a homestead entry. The commissioner claimed that one-half of the vacant public domain, as it existed in 1876, belonged to the school fund. This was in accord with the previous judicial interpretation of the Constitution by the Supreme Court. He also showed that more land had already been acquired by private owners since that time than had been allotted to the school fund. He contended, therefore, that no vacant public domain was left which was available for homestead entry. The Supreme Court sustained his contention and held that since more had been ac-

¹⁰ 92 *Texas*, 58, 1898.

quired by private owners than had been allotted to the school fund, the remainder equitably belonged to that fund.

THE ADMINISTRATIVE SYSTEM

The problem of administering the Texas land system has consisted chiefly in that of keeping an account of grants and claims for land, of making the proper surveys, of issuing patents to legal claimants, of keeping an accurate record of the surveys that have been made and patents that have been issued and of guarding the state against fraud and misrepresentation in the disposition of its public lands. All of this work has been conducted under the direction of the commissioner of the general land office. In addition to these general duties, the school land department has been created as one of the separate divisions of the land office so that the land commissioner has been charged with the general supervision of the sale and lease of reserved lands. Although these duties are largely technical and ministerial in character, yet the office has always been of sufficient importance and the salary sufficiently remunerative to command the attention of some of the best men of the state, and not infrequently the reports and counsel of the land commissioners have been of immeasurable assistance to the legislature. In fact if the legislature had been careful to follow the recommendations of the land commissioners more frequently than it did, the state, without doubt, would have realized more, both in financial returns and in general social welfare, from its public lands than it did or than is now possible.

The Constitution of the Republic of Texas provided that a general land office should be established by law for the purpose of simplifying the land system and of protecting the people and the government from litigation and fraud.¹¹ All titles to land within the republic were required to be registered in this office. Accordingly a land office was nominally established at Austin by an act of Congress in December, 1836; but owing to the unsettled condition of the country at that time, the actual opening and operation was suspended from time to time by subse-

¹¹ Sayles, *Early Laws of Texas*, 1: 208.

quent acts of Congress and executive orders, so that the office was not really opened for the issuance of new titles until 1844, eight years after it had been nominally established. The constitution of the state required that a general land office should be maintained at the seat of government, and similar provisions have been placed in all subsequent constitutions. The organization of the land office consists of a commissioner, his deputy, a receiver who takes charge of all money due the office, and such other expert and clerical help as is necessary. All of the books, records, and papers pertaining to lands are required to be recorded in this office. In general, the principle and organization is the same as that of the general land office of the United States.

The constitution of the Republic also directed that the whole territory of the Republic should be sectionized in order to enable the officers of the government or any of its citizens, to estimate with certainty what lands were vacant and what ones were covered with a valid title.¹² The establishment of a general system of surveying was left for subsequent acts of congress. The following year a law was passed which directed that one base-line and four meridian lines should be run in such manner as the commissioner of the land office should direct and that subsequent surveys should be made from these lines.¹³ The probable intention of the constitution and of the subsequent acts of congress of the Republic of Texas was that the territory should be sectionized according to the rectangular system used in the United States. But in reality this system has not been followed except in the surveys made by railway companies and by the government on its reserved lands.¹⁴ The Republic of Texas was also divided into twelve land districts; but, generally speaking, since Texas became a state, each organized county has constituted a land district and has had its own surveyor who is required to make the maps and plats of his county and report them to the general land office. There is no general supervision over the surveying by a state officer other than the land commissioner.

¹² *Ibid.*

¹³ *Ibid.*, p. 244.

¹⁴ Sayles, *Real Estate Laws of Texas*, 1: 449.

SOCIAL ASPECTS OF THE LAND QUESTION

The question of the number and size of farms that will exist in a given area is primarily a problem which will be determined by the economic forces of the community, the adjustment being made to suit the climate and topography of the country and the nature and fertility of its soil. Improvements in farm implements will also have a bearing on the problem since they will largely determine the scale upon which agricultural operations may be conducted. But the natural forces which affect its solution may be modified by legislation, especially insofar as this legislation attempts to influence and regulate ownership of the land; and to this extent the question of the number and size of the farms in Texas is one for consideration here. The policy of all Texas land legislation has been ostensibly to encourage private ownership of land in small quantities by actual occupants. The impression now prevails very generally, however, that the legislative system has permitted the acquisition of a vast number of individual holdings, not necessarily in contiguous tracts, which in the aggregate far exceeds the quantity which the legislature ever intended that an individual should possess. This impression cannot, in the absence of adequate census enumeration, be statistically demonstrated or dispelled. Nevertheless recent census reports do show that out of 417,770 farms only 167,515, considerably less than half, are operated exclusively by owners; also that while the total number of farm operators increased from 228,126 in 1890 to 417,770 in 1910, an increase of 83.1 per cent, the number of tenants increased from 95,510 to 219,575, or 129.9 per cent.¹⁵ During the same period the average size of farms in Texas increased from 225.3 acres in 1890 to 357.2 acres in 1900 but fell back to 269.1 acres in 1910.¹⁶ This situation seems to the writer clearly to bear out the conclusion that "the government cannot give away valuable lands or sell them at prices far below their real value without subsidizing the speculator, endowing monopoly, and pauperizing the people. The poorer classes derive no real benefit from this indiscrimin-

¹⁵ Thirteenth Census, *Reports Texas Supplement*, p. 8.

¹⁶ See Table VI pertaining to land ownership in Texas, p. 149.

ate charity.”¹⁷ In spite of the state’s well intended assistance to the worthy pioneer, shrewd, far-seeing and competent private owners are now reaping the harvest of its benevolent generosity at the expense of the less shrewd and less competent actual occupants of the soil.

As stated in the introduction to this monograph, the general tendency of land legislation, both in European countries and in the United States, has been to encourage individual holdings of land. An illustration of the actual tendencies in this direction is found in Germany where the total number of farmers who own land has increased from 5,558,317 in 1895 to 5,736,082 in 1907, a net gain of 177,765 in twelve years.¹⁸ This gain is made by a large increase in the number of farmers on holdings containing twenty hectares (49.42 acres) or less and a corresponding decrease on those containing more than twenty hectares.

The tendency, though not so marked, has been in the same direction in England where there has been a net gain of 140,534 farms, containing one acre or more, since 1871.¹⁹ Agricultural statistics show that there has also been a marked increase in the number of real farms in the United States since 1850 and that the largest additions have been in groups of those containing fifty acres and over. The census officials reported in 1900 that this growth indicates “a movement toward agricultural individualism as distinct as the opposite tendency in cities toward wage service and dependence upon employers.”²⁰ While this tendency continued throughout the decade 1900–1910, it is very significant that the number and acreage of farms increased much less rapidly than the total population.²¹

During this period, however, the number of farms containing 1,000 acres and over has increased in the United States from

¹⁷ Ely, Richard T., *op. cit.*, p. 593.

¹⁸ *Statistisches Jahrbuch für das Deutsche Reich*, 1909, pp. 55–56.

¹⁹ Board of Agriculture and Fisheries, *Agricultural Statistics*, 1908, vol. 43, part 1, p. 72; also a table showing number and size of agricultural holdings in England in 1871, reprinted from a report of the Committee of the House of Lords in 1873 in Taylor, C. F., *The Land Question from Various Points of View*, p. 46. I have not been able to verify this table but owing to its importance, I feel that it is approximately correct and too authentic to be omitted.

²⁰ United States Census Reports, 1900, 5: xlv.

²¹ Thirteenth Census Abstract, p. 266.

3,720 in 1870 to 50,135 in 1910. Moreover, in 1870 there was only one farm containing 1,000 acres or over for every 724 other farms of smaller size, whereas in 1910 there was one farm containing 1,000 acres or over for every 126 other farms of smaller size. The evidence relating to this subject shows conclusively, therefore, that the tendency in the United States toward the ownership of land in large quantities has been rapidly increasing proportionately during the past four decades. In this connection, however, it should be noted that the increase in the number of such farms in the New England, West North Central, Mountain and Pacific states for the decade 1900-10 more than offset the comparatively slight decrease in the other groups of states to the extent of 2,795 farms, which was the net increase in the number of this type of holdings. The details of this situation are shown in the following table:

TABLE IV—SHOWING THE INCREASE AND DECREASE IN THE
NUMBER OF 1000-ACRE FARMS BY GROUPS OF
STATES, 1900-1910

Groups showing a decrease:

Middle Atlantic	90
East North Central	188
South Atlantic	866
East South Central	412
West South Central	743
Total decrease	2,299

Groups showing an increase:

New England	81
West North Central	2,266
Mountain	1,780
Pacific	1,147
Total increase	5,274
NET INCREASE	2,975

This tendency is not so pronounced in the United States as in Texas where the total number of farms in this group has risen from 72 in 1870 to 11,123 in 1910 and where approximately one-fourth of the total number of farms in the United States con-

taining 1,000 acres or over are situated. A study of the following table which sets forth the distribution of large farms among states containing more than 1,000 farms of this class, shows that there are 6,430 more farms containing 1,000 acres and over in Texas than in any other state in the Union. The net gain in the number of farms in this class for the decade 1890 to 1900 was 5,805, but the total number of such farms declined 97 in the succeeding decade. Probably most of these large farms were formerly held as cattle ranches but recent census reports state that during the past ten years much of this land has been purchased by speculators for sale in smaller farms and that at the time of the enumeration most of it was in the hands of these speculators or of purchasers who had not yet occupied it.²²

TABLE V—DISTRIBUTION OF LARGE FARMS IN UNITED STATES, 1910

States having 1,000 or more farms con- taining not less than 1,000 acres each	Land area in square miles	Number of farms con- taining 500 acres but less than 1,000	Number of farms con- taining 1,000 acres and over
United States	2, 973, 890	125. 295	50, 135
California.....	155, 652	5, 119	4, 693
Colorado	103, 658	2, 426	1, 577
Georgia.....	58, 725	3, 950	1, 521
Kansas.....	81, 774	10, 475	3, 360
Louisiana.	45, 409	1, 548	1, 018
Montana	146, 201	2, 353	1, 999
Nebraska	76, 808	13, 128	3, 867
North Dakota	70, 183	12, 662	2, 416
Oregon.....	95, 607	2, 716	1, 716
South Dakota	76, 868	12, 662	2, 416
Texas.....	262, 398	12, 833	11, 123
Washington.....	69, 121	3, 481	1, 726
Wyoming.....	97, 594	984	1, 155

Unquestionably the cattle business has favored private acquisition of many, if not most, of these large tracts of land in Texas. Nevertheless a far-sighted land policy would have opened the land to the cattleman without prejudicing the in-

²² *Ibid.*, Texas Supplement, p. 6.

terests of the bona fide settler when the state decided that the land should be opened for further agricultural development. To the extent that these large farms are now held by speculators rather than either cattlemen or operating farmers, the land system may be said to have fallen short of accomplishing its purpose.

A question of greater importance at the present time than speculative ownership is the problem of tenancy. In 1910 Texas had a population of 3,896,542 of which 75.9 per cent were living in country districts or in towns of less than 2,500 inhabitants. Furthermore, the census returns for 1900 show that there were 341,524 families living on farms as compared with 240,531 living in other homes; but of all those living on farms, only 163,912 families—less than one-half—were living on farms which they owned. All the remainder of the farming population were tenants. Carrying this analysis still further, it is found that only 125,504, or thirty-six per cent of the farming population, were living on unencumbered farms. The federal census returns for 1910 do not show the distribution of the population between urban and rural communities in terms of families, but in view of the fact that the percentage of farms operated by tenants has increased from 49.7 to 52.6 during the past decade, it is apparent that tenancy as a factor in the problem of rural betterment in Texas is not declining in importance.

A comparison of the subject of farm homes in Texas with that of other states presents the Texas situation in a very unfavorable light. There are only seven other states in the Union in which the number of tenant farmers exceeds the number of farmers who own their land. These are Alabama, Arkansas, Georgia, South Carolina, Louisiana, Mississippi, and Oklahoma. In California, a state whose land system originated in Spanish and Mexican laws just as did that of Texas, but which system subsequently became merged into that of the United States, 79.4 per cent of the farmers are land owners, while only 20.6 per cent are tenants. Furthermore, in thirty-three states the number of farmers cultivating land which belongs to them exceeds 65 per cent of the farming population, while in Ohio the figures for this group stand at 71.6 per cent; Indiana, 70 per

cent; Minnesota, 79 per cent; Michigan, 84 per cent, and Wisconsin 86.1 per cent. Moreover, if all the states bordering on the Atlantic Coast and on the Gulf of Mexico be excluded from this comparison, there still remain only four states in the Union in which the number of farmers who own their land is less than 60 per cent of the total number of farmers. It appears, therefore, that in the great majority of states in which agriculture is a principal industry, the number of tenant farmers is less than two-fifths of the farming population, whereas in Texas it is more than one-half. During the four decades, 1880–1910, the number of tenants in Texas increased from 65,468 to 219,575, a proportionate growth of 335 per cent. In 1880, tenants constituted 37.6 per cent of the total number of farm operators; whereas in 1910 they composed 52.6 of all such operators. Moreover, a recent study of tenancy in thirty-seven cotton growing counties shows that the average number of tenants in these counties exceeds 59 per cent of all farm operators,²³ and that “the great agricultural and industrial problems of present day Texas are to be found in a section of the state which was organized five or ten years after Texas entered the Union.” These 37 counties include all the greatest cotton growing counties in the state. Since the avowed purpose of Texas land legislation has been to transfer as quickly as possible the title of the public domain from the state to persons who would reside upon and use it, and since in so doing actual residence and improvement have been a condition precedent to title, these figures present an anomalous situation. The predominating class of farmers in a country which has boasted of its free land and in which the government has literally given away the land to encourage immigration and settlement of its public domain are tenants.

Many causes, social, economic, personal, may be assigned for the rapidly increasing number of tenants in Texas. A careful analysis and lucid presentation of some of these causes has recently been made.²⁴ From the historical point of view, however, the writer believes that the influence of legislation in the

²³ *Studies in Farm Tenancy in Texas*, Bulletin of the University of Texas, No. 21, April 1915, p. 15.

²⁴ *Studies in Farm Tenancy in Texas*, op. cit. 1915; also *Studies in the Land Problem of Texas*, Bulletin of the University of Texas, No. 39, 1915.

disposition of public land should not be overlooked. It must be remembered that many, many tracts of land containing as much as 1280 acres were granted to individuals in the early days of Texas history. Even the more moderate donations to homesteaders rarely contained less than 160 acres and frequently as many as 320 and 640 acres. The ease with which many of these tracts could be acquired and disposed of to an assignee was an inducement to the speculator, and consequently there probably are many farms in Texas today that are owned by one man and cultivated by another because of the unusual liberality of the land laws.

The necessities of a grain-growing and live stock-raising agriculture in the pioneer days of Texas, however, required the donation and acquisition of tracts containing large areas. Conditions have so changed in modern agriculture as it is practiced in Texas that the economic farm unit is now smaller than it was prior to 1870. Students of the cotton industry have shown that cotton growing got its first real hold in Texas during the decade 1870-80. The average modern cotton grower rarely uses more than 50 to 80 acres, while the wheat and corn grower is cultivating 160 to 200 or possibly 240 acres.²⁵ Hence the legal unit in which the land was originally granted was larger than the economic unit that is now being cultivated by the farmer.

Consequently there are two classes of landowners in Texas who are leasing all or part of their land to tenants; one composed of those who acquired their land for speculative purposes because it was easy to get, and the other composed of farmers who possess tracts that are larger than they can profitably operate. Many of the former class never seriously contemplated operating their land themselves. Tenancy is inevitable wherever very much speculation is indulged. In the face of the rising land values of the past fifty years, it is too much to expect that many of the latter class of owners, or their heirs or assignees, would separate their holdings into parcels suitable for modern agriculture and sell them to non-owning operators. The leasing system is a natural development in such circumstances.

²⁵ See *Studies in the Land Problem of Texas*, op. cit. pp. 40-41.

The extent to which this situation prevails cannot be statistically demonstrated. An indication, however, that this analysis is correct is found in the fact that in 1900 there were 174,991 rented farms in Texas, 166,088 of which were held by owners who resided within the state; and that there were 100,310 resident as compared with only 1756 nonresident owners of these farms.²⁶ The federal census for 1910 showed 6531 farms operated by tenants in Brown, Fort Bend, Medina and Robertson counties. In 1914, 850 of these farms, only 13.3 per cent, were found to be owned by men who resided outside of the county in which the farms were located.²⁷ It seems to be further indicated by the fact that 50.5 per cent of the farms now fall within the groups ranging in size from 20 to 99 acres and that 73.1 per cent fall within the three groups ranging in size from 20 to 174 acres.²⁸ Thus it will be seen that nearly three-fourths of the farms actually being operated are not larger than the smallest unit commonly granted by the state in its transfer of the public domain to private owners.

Is tenancy a step toward ownership? The report of the Twelfth Census (1900) contains the following interesting comment:

"Outside of the Southern divisions, a relatively small amount of farm property was concentrated in the hands of a few individuals. The names of owners, when taken in connection with those of the tenants, suggested in a large number of cases, relationship between the owner and the tenant, as that of father and son. Tenancy of this character marks the first step toward transfer of ownership. The owner, once an active farmer, reaching advanced years and wishing to cease the intense labor of earlier life, surrenders the care of his farm to his son or to another individual, who cares for the farm as tenant for a few years and later becomes the owner."²⁹

Ten years later Professor Hibbard, who assisted in the preparation of the Thirteenth Census reports pertaining to agriculture, pointed out the fact that the highest proportion of ten-

²⁶ Twelfth Census Reports, vol. 5, p. 309.

²⁷ Thirteenth Census, *Texas Supplement*, Tables 1 and 2: *Studies in Farm Tenancy*, op. cit. pp. 33-35.

²⁸ Thirteenth Census, *Texas Supplement*, p. 9.

²⁹ Vol. V, p. lxxxix.

ancy is found in connection with the land highest in price within the states in which general agriculture predominates;³⁰ also that "the system of farming is a factor equally important, if not more important, than the price of land in turning the scale in favor of ownership or tenancy. Those who engage in what is called the mining type of farming are losing their hold on the soil. Those engaged in a more profitable type are retaining it to a much greater degree. Whatever forces raise the value of land make greater demands on the farmer who aspires to ownership. Whatever increases the efficiency of the farmer makes ownership more probable."³¹

It is very hard for one who studies the facts of tenancy as it exists in the United States to feel that tenants as a class are progressing happily on the road to ownership. Apparently the larger part of them are of the inefficient type of farmer who lacks the organizing ability and business acumen so essential to success in modern profit-seeking agriculture. They are also afflicted with "absolute" rather than "relative" poverty to the extent that they are unable individually to improve their condition. If Professor Hibbard's analysis is correct, and the writer believes that it is, the only way of escape from the tenant's present conditions appears to lie in such organized associative effort among the farmers and legislative cooperation in the community as will enable the individual farmer to become a better producer and a more successful business man.

The foregoing observations regarding the relationship between land ownership and tenancy in the United States are especially applicable to the situation in Texas. The following table shows the changes in the number of farms, average size of farms, average value of land and buildings per farm, and tenancy from 1850 to 1910:

³⁰ Hibbard, B. H., *Tenancy in the United States*, in *The Annals* 40: 29 (1912).

³¹ Hibbard, B. H., *Tenancy in North Central States*, in *Quarterly Journal of Economics* XXV.

TABLE VI.—LAND OWNERSHIP IN TEXAS³²

Year	Number of farms	Average acreage per farm	Average value of land and buildings per farm	Average value of land and buildings per acre	Percent of farms operated by tenants
1850.....	12,198	942.5	\$1,357	\$1.44	.....
1860.....	42,891	590.9	2,054	3.48	.....
1870.....	61,125	301.6	787	2.62	.....
1880.....	174,184	208.4	979	4.70	37.6
1890.....	228,126	225.3	1,753	7.78	41.9
1900.....	352,190	357.2	1,964	5.50	49.7
1910.....	417,170	269.1	4,412	16.39	52.6

Particular attention is called to the fact that the value of land and buildings per acre has trebled during the past decade; to this extent has the difficulty of passing from tenancy to ownership been increased on account of the value of land.

What now of the poverty of the tenant? Studies pertaining to the property owned by tenants indicate that the average renter possesses not more than \$350 worth of personal property whereas \$758 worth of domestic animals and implements is regarded as essential to the successful operation of an average farm.³³ In 1913 it appeared that only 30 per cent of the 2,803 nonlandowning country dwellers in Travis and Ellis counties possessed from \$400 to \$790 worth of property and were thus able at best to furnish a one-team farm. Inability to accumulate enough personal property in the form of domestic animals, implements and household goods to equip a one-team farm at a time when the average value of a 69-acre farm is \$6,000 makes poverty a very formidable barrier to progress toward landownership for the majority of tenants in Texas. Further than this, the coincidence of the one-crop cotton-growing industry of the state with the farms occupied by tenants testifies abundantly to the inefficiency of the agricultural methods practiced in this great state.

³² Adapted from the Thirteenth Census. Texas Supplement, pp. 6-9.

³³ See Appendix III, n.

High priced land for the landowners and poverty and inefficiency for the landless make the step from tenancy to ownership all too long for most farmers. Considered in the light of the history of Texas public land legislation, they also indicate clearly that benevolent donations of public property generously bestowed upon the worthy poor in one generation will not relieve the succeeding generation from want and necessity. Social responsibility for the economic status of the individual is not discharged by public charity. Long will Texas, just as many other states, be obliged to wrestle with mistakes growing out of the unwise legislation of former generations. May the great state of the future learn from the past to help the landless and the homeless to help themselves rather than bountifully endow them out of a public treasury temporarily replenished from the proceeds of public credit!

Ownership of land in Texas by corporations and aliens is prohibited. Prior to 1893 no legal restrictions had been placed upon such acquisition or ownership, except such as were contained in the law providing for the sale of reserved lands. By far the largest corporate owners of land were the railway companies; and on account of the fact that their lands were rapidly increasing in value and were being used to an excellent advantage as a basis of credit on loans obtained in the financial centers of Europe where land security was regarded as the very best, these companies were refusing to alienate their lands as required by law. Schemes were also devised whereby land was transferred to a land company, consisting chiefly of the officers of the railway corporations, which managed and disposed of it for the benefit of the railway company or its creditors.³⁴ The spirit of the law was thus evaded. In the western part of the state land was also being acquired and held in large tracts by the big cattle companies, and this was placing a great obstacle in the way of the homesteader. Consequently, a law was passed in 1893 which declared "that the unrestricted ownership of lands in this state by private corporations is a perpetuity and is hereby

³⁴ Potts, Charles S., *Railroad Transportation in Texas*, Bulletin of the University of Texas, No. 119, p. 104.

prohibited.’’³⁵ All corporations owning land at that time were required to dispose of their holdings within fifteen years. At the close of the session of the legislature which passed this measure Governor J. S. Hogg delivered a congratulatory address in which he classed this act as one of the three great measures passed at the session and declared that the people of Texas might now hope to see the corporate land monopoly pass the dominions of the state.³⁶ Similar provisions were enacted at the same time in regard to the ownership of land by aliens.

CONCLUSION

In accordance with the various legal methods which have been described in the foregoing pages, the state of Texas has disposed of practically all of its public lands. None whatever remain to be acquired under homestead laws. Approximately 2,000,000 acres of public school land and a little over 2,000,000 acres of university land are all that are left in the control of the state out of a vast domain comprising more than 170,926,080 acres. Unless serious and unexpected changes are made in the plan now being used for the sale, these reserved lands will soon be disposed of and the state will have become the recipient and custodian of the proceeds of their transfer to private owners. The public land question, therefore, has practically ceased to be a vital issue in Texas politics. Other questions of equal concern, however, which are a direct outgrowth of the disposition of the public lands have required and are now receiving most earnest consideration throughout the whole state, and they will continue to demand the best thought of its citizens and the most unselfish and devoted efforts of its statesmen for years to come. The importance and significance of these questions are greatly enhanced on account of the mistakes and failures that were made in the land legislation of former years.

With the passing of the public land question in Texas, doubtless no one, even the most optimistic, will say that the state has

³⁵ *Laws of Texas*, 1893, p. 36.

³⁶ Wooten, Dudley G., *Comprehensive History of Texas*, 2: 311.

made the best possible use of this vast domain. Sections sixteen and thirty-six having been reserved for school purposes as in other states, the question of whether or not the state would have profited more in a financial way and have obtained better social and industrial conditions by ceding its lands to the federal government at the time of annexation, to be disposed of according to the land laws of the United States, is one which does not lend itself to definite proof. The occupation and improvement of the vacant land, the advancement in agriculture, and the growth in some industrial lines seem to have been more rapid and phenomenal in Texas on account of the assistance rendered by its land system than they otherwise would have been. On the other hand, the state seems to have been imposed upon by promoters, stock jobbers and land grabbers to just as great an extent in comparison with the magnitude of the interests involved as the federal government. Speculation in land has been just as flagrant and the tendency of farms to increase in size and to be owned by others than actual occupants is much more noticeable for reasons previously set forth. In view of these facts, a state government, particularly that of Texas, can hardly be said to be more successful than the national government in disposing of public lands, and insofar as the land system of Texas has not been able to avoid the mistakes of other systems and to foster and maintain a widespread condition of ownership by the operating farmer, the state is confronted with social and industrial problems just as serious as those of some of its neighboring states. This is particularly true in regard to the development of the mineral lands, the proper use of the standing timber, the reforestation of cutover lands, the protection of the agricultural population against the acquiring and holding of farm land by nonresident owners and the organization and regulation of industrial and commercial corporations.

Public attention has already been directed toward the solution of the railway problem and considerable success has been attained, but this problem is still an important issue. At the time when such liberal aid was being rendered to these corporations they seem to have obtained control of the state and were exercising this control much to the detriment of the public. At

the time when the decision in the case of *Davis v. Gray* was rendered they were in the zenith of their power, and it is said that "this [decision] made the chartered companies of persons the head and controllers of a little government of their own within the terms of the charter and independently of the state in which the charter was granted; and since that time, incorporated companies have been emboldened to assert and to act upon this judicially adjudged independence." Since then the pendulum has swung to the other end of the arc and these companies have been forced to recognize the supremacy of law. More than 10,000,000 acres which had been patented to them have been recovered; the issuance of their stocks and bonds has been regulated; their rates have been fixed and their service determined by the railroad commission; their political power has been greatly diminished by the prohibition of lobbying and the abolition of free passes; and, in general, they have been "reduced from the position of masters to that of the servants of the people." As a result, it is said that

"the state can now afford to adopt a policy sufficiently liberal to allow the companies to make the many extensions and betterments which all agree are necessary to provide the community with adequate railway facilities. Such a plan would seem to be in line with good public policy, aside from many questions of fairness to the owners of railway property."⁸⁷

One of the most important problems at the present time is the attitude which the state assumes and will take in the future toward the corporate form of industrial activity. The abundance and variety of raw material within the state seems especially to favor the development of manufacturing industries, and the establishment of those which will make use of the standing timber is regarded as particularly necessary and desirable. But progress along this line has been greatly retarded by the scarcity of capital in the southwest. Owing to their experience with the railway and other internal improvement companies, the people of the state seem to have become suspicious of all forms of corporate activity and have imposed political conditions and re-

⁸⁷ Potts, Charles S., *Railroad Transportation in Texas*, Bulletin of the University of Texas, No. 119, p. 200.

strictions upon such undertakings which increase rather than diminish the need for outside capital. Instead of being a fertile field for investments, as one would naturally suppose, Texas seems to be the opposite. The large insurance companies with all their excellent facilities for supplying the much needed capital have withdrawn from the state, and valuable agency organizations have been broken up on account of the law regulating the investment of reserves supposedly to secure greater safety for the policy holder, but primarily to create a market for Texas securities and to obtain a revenue for certain counties.³⁸ A committee representing the Merchants' Association of New York, in response to an invitation from the governor and the legislature of Texas, visited the state in 1901 with a view of ascertaining its opportunities for the development of new business. The committee published an elaborate report in which the natural resources and economic conditions of the state were carefully and explicitly described. But the report also contains the following statement:³⁹

"Whether true or false, the belief is widely current that public sentiment in Texas deems the corporate form of capital harmful to the public welfare, and, therefore, worthy of severe restrictions and penalties with which other forms of capital are not burdened. Moreover, the corporate capital from without the state is supposed to be regarded by that public sentiment, not as an instrument for multiplying the riches of that state, but on the contrary, for abstracting them and taking them away and, therefore, to be impeded as much as possible by severe and discriminative taxation. Beyond question, this belief, whether prejudicial or well founded, has deterred investment in Texas and materially impaired its development by leaving it dependent upon its insufficient home capital."

If such growth and advancement in industrial enterprises as seems desirable is to take place, judicious legislation must be enacted which will permit and wisely regulate the use of outside capital within the state.

The relationship between landlord and tenant has now become one of the most acute economic problems in Texas politics and

³⁸ Zartman, Lester W., *Mistakes in State Regulation of the Insurance Business*, *Yale Review*, 17: 28 (May 1908).

³⁹ Merchants' Association of New York, *Report*, 1901, p. 81.

much more acute in Texas than in any other state in the Union. Tenants have organized themselves in an association bearing the name of the Renters' Union of America. Measures ranging all the way from the fixation of a "fair rent" by public authority to a tax "to the limit on all land held for speculation and exploitation" are being strenuously advocated. The old time idea of "use and occupancy" as the only just basis for title to land, long ago advocated by the Knights of Labor, has been revived and declared to be the only wise and reasonable method of improving the miserable and wretched condition of tenants. To this extent did the fathers fail to achieve their cherished ideals of permanently providing lands for the landless and homes for the homeless by generously bestowing their heritage upon many worthy but unappreciative recipients. The legislation which will assist in the provision of homes and small farms "for our good people" is a problem exactly similar in character and of no less importance or significance than the disposition of the public domain. In meeting and solving this problem Texas citizenship will manifest its genius and capacity for social advancement through political organization and will contribute generously and bountifully to the knowledge and experience necessary for the social well-being of the state and nation.

APPENDIX I

THE COST OF THE PUBLIC DOMAIN

"Washington, D. C.

September 26, 1913.

Mr. Reuben McKittrick,
Cedar Falls, Iowa.

My dear Sir:

Complying with your request of September 9, 1913, I inclose herewith a statement showing approximately the cost and expenses of the public domain to June 30, 1913. The amounts of some of the expenses incurred are not available and some of the figures herein stated are estimated. This statement shows excess of receipts over expenses to be \$68,596,877.67.

The war and exploration expenses are not taken into consideration in the figures stated, and if they were included they would probably show a greater deficit than the \$150,000,000 given by Dr. Shaw.

Very respectfully,

(Signed) C. M. BRUCE,
Acting Commissioner."

STATEMENT SHOWING COST OF AND RECEIPTS FROM THE
PUBLIC DOMAIN FROM THE GEORGIA CESSION
1802 TO JUNE 30, 1913.

	Receipts	Expenses
Purchases and cessions exclusive of expenses of commissioners of treaties and boundaries. See <i>Senate Executive Document</i> No. 38, 2nd Session, 45th Congress.....		\$88,157,389.98
"Expenditures for surveys and disposition from January 1, 1785, to June 30, 1880, estimated.".....		46,563,302.07
"Quieting and purchasing the occupancy title of Indians to public domain.".....		187,328,903.91

STATEMENT SHOWING COST OF AND RECEIPTS FROM THE PUBLIC DOMAIN
FROM THE GEORGIA CESSION 1802 TO JUNE 30, 1913—Continued

	Receipts	Expenses
From the origin of the public domain to the 30th of June, 1880, the net cash receipts therefrom have been	\$200, 702, 849.11	\$322, 049, 595.96
Year		
1881.....	5, 408, 804.16	1, 352, 304.84
1882.....	8, 394, 516.04	1, 514, 906.87
1883.....	11, 713, 883.70	1, 810, 357.08
1884.....	12, 789, 405.09	1, 895, 779.30
1885.....	8, 628, 420.18	1, 871, 169.15
1886.....	9, 031, 084.34	1, 657, 143.09
1887.....	12, 289, 008.87	1, 540, 078.49
1888.....	13, 547, 137.43	1, 649, 474.59
1889.....	9, 685, 901.34	1, 766, 550.71
1890.....	7, 780, 517.61	1, 787, 233.59
1891.....	10, 477, 700.32	2, 137, 337.38
1892.....	4, 860, 109.69	1, 982, 546.85
1893.....	4, 479, 734.14	2, 019, 255.67
1894.....	2, 767, 824.32	1, 600, 255.59
1895.....	2, 033, 454.03	1, 796, 582.34
1896.....	2, 106, 361.67	1, 646, 007.91
1897.....	2, 087, 931.28	1, 760, 468.42
1898.....	2, 277, 995.18	1, 737, 725.23
1899.....	3, 070, 137.34	2, 009, 670.06
1900.....	4, 379, 758.10	2, 067, 409.33
1901.....	4, 972, 160.79	2, 306, 125.48
1902.....	6, 261, 927.18	2, 302, 498.11
1903.....	11, 024, 743.65	2, 332, 169.26
1904.....	9, 283, 341.98	2, 567, 342.69
1905.....	7, 017, 811.38	2, 449, 629.58
1906.....	7, 585, 523.90	2, 100, 595.28
1907.....	11, 553, 178.00	2, 226, 227.23
1908.....	12, 715, 709.46	2, 342, 420.85
1909.....	12, 216, 415.39	2, 599, 268.27
1910.....	11, 463, 924.06	3, 064, 928.70
1911.....	11, 089, 927.60	3, 195, 759.38
1912.....	9, 973, 048.00	3, 573, 692.88
1913.....	6, 955, 504.81	3, 316, 362.30
	\$460, 625, 750.13	\$392, 028, 872.46
	392, 028, 872.46	
	\$68, 596, 877.67	

Note—Receipts and expenses to June 30 each year, including sales of Indian lands (money held in trust for the Indians).

Expenses of surveying Indian land cannot be obtained from the Commissioner of Indian Affairs.

Proportionate cost of war for holding the land not included.

Figures to June 30, 1880, from *The Public Domain*.

Figures from 1881 to 1913 from the annual reports of this office.

Area of public land remaining undisposed of June 30, 1913:

Surveyed 179,204,397 acres.

Unsurveyed 486,686,632 acres.

Indian, forest and other reservations not included in above.

APPENDIX II

DISPOSITION OF PUBLIC LAND IN TEXAS¹

Purpose	Quantity in acres
Titled by authorities of Spain and Mexico*.....	26,280,000
Headright grants and certificates for military service, Republic of Texas*.....	36,876,492
Empresario contracts, Republic of Texas*.....	4,494,806
Preemption claims and homestead donations*.....	4,847,136
Grants to railways*.....	32,400,000
Grants to other internal improvement companies*.....	4,061,000
Capitol building†.....	3,050,000
County school fund.....	4,229,166
State school fund.....	45,000,000
University fund‡	2,289,225
Eleemosynary institutions*	400,000
Veterans of Texas Revolution*.....	1,169,382
Veterans of the Confederacy*.....	1,979,852
Sold to pay the public debt*.....	1,660,936
Ceded to the United States in 1850*	67,000,00
Total	235,737,995

* Commissioner of the General Land Office, *Biennial Report*, 1910, pp. 21-31.

† Commissioner of the General Land Office, *Report of the Findings of a Special Commission*, 1899, p. 16.

‡ Commissioner of the General Land Office, *Biennial Report*, 1902, p. 37.

¹ The figures listed above are, for many items, approximations only. Nevertheless they are the best data available and for most purposes doubtless will be sufficient. An exact tabulation has never been made by the General Land Office as the following quotation from the *Biennial Report*, 1910, p. 25, shows: "All statements as to amount of land granted for any purpose are approximations only. There was never a system of accounting kept in the Land Office whereby anything like definite knowledge could be had as to the exact acres granted for any purpose. To get it exact one would have to go through each file, amounting to a million or more."

APPENDIX III

a The progress that has been made in developing small holdings in England under the *Act* of 1908 is indicated by the following statement from the last annual report on this subject. "The total quantity of land acquired under the *Act* is therefore 198,288 acres, 139,478 acres having been purchased for £4,601,692 and 58,810 acres leased for rents of £74,186 a year. Of this land 178,911 acres have been actually let by County Councils to 12,584 individual small holders, and 506 acres sold to 50 small holders, and the Councils of County Boroughs have let 1,259 acres to 218 individual tenants. In addition 8,436 acres have been let to 63 Cooperative Small Holding Associations, who have sub-let the land to 1,451 of their members, and 3,580 applicants have been provided with 47,500 acres by private landowners direct. The land acquired by the Board at Bournemouth is let to 16 individual tenants and one Small Holding Society, who hold 75 acres which is sub-let to 62 tenants. The land which has been acquired by County Councils, but which is not yet let in small holdings, amounts to 9,653 acres, which it is estimated will provide for 475 applicants, and the Councils of County Boroughs have about 310 acres not yet allotted, which will probably provide for about another 50 applicants. It appears, therefore, that the *Act* has resulted in the provision of small holdings for 18,486 applicants in seven years."—Board of Agriculture and Fisheries, *Annual Report, Part I. Small Holdings*, 1914, pp. 3-4 (Cd 7851.)

From Table F in the foregoing report (page 30) it appears, however, that the acreage acquired by County Councils constitutes only .7 of one per cent of the total acreage in England under crops and grass and only 4.7 per cent of the total acreage of "Holdings above 1 acre but not exceeding 50 acres."

b The comment of Mr. Marriott on the policy of creating state-aided ownerships and tenancies at the close of his four articles on the *Evolution of the English Land System op. cit.* is significant here, especially in view of the fact that by far the larger part of the small holdings thus created are tenancies rather than proprietorships. "Whatever may be the case in regard to large holdings, there seems to be no doubt that for the small holder the method of purchase is infinitely preferable to that of tenancy under a public authority. Indeed, the system under which, as at present, the smallholder embarks upon the profitless task of buying the land, by annual installments included in his

rent, not for himself but for the County Council, seems to combine every possible disadvantage. Under the alternative plan of purchase, every year, or every installment, brings the cultivator nearer to the goal of complete and unfettered ownership.

"Not that small holdings, whether purchased or rented, can be regarded as a panacea. In certain districts, under certain conditions, their multiplication would be an unmitigated gain. But the best friends of agriculture are at one with the hard teachings of experience in warning us that the policy, if indiscriminately adopted, can result only in acute distress and cruel disillusionment.

"But whatever method—ownership, tenancy, cooperation, or what not—one condition is essential to improvement: a sense of security and stability. What the land wants is a steady application of capital, provided either by a cultivating owner, or by a landlord, or by a well-secured tenant, or by a banker, and without security for the investment it would not be forthcoming from private sources, and ought not be forthcoming from the state.

"In regard to the State-aided purchase on a large scale, one point deserves attention. Lord Eversley has made it clear that the scheme cannot be recommended to England on the analogy of Ireland. In Ireland only a moiety of the ownership attached to the landlord, and had to be purchased from him. The advances made by the State to the tenant have been made therefore largely on the security of the tenant's own moiety. This security is entirely lacking in the case of English tenants and the lack of it greatly affects the financial complexion of any purchase scheme which can be devised. Nevertheless, a scheme must be devised, and for a few years some risks must be taken. If the plan of reducible mortgages—under which the tenant repays the principal by annual installments—be adopted the initial risk will not be great, and it will diminish every year. But the State must not go too fast. The politicians must not be permitted, for their own interested reasons, to hurry it. The patient is not *in extremis*; if let alone he would soon be convalescent. *Festina lente* is a sound maxim of statesmanship, and it is pre-eminently applicable to any scheme for converting, by means of State capital, the cultivators of the soil into proprietors. On every ground, social, political and economic, such a conversion is desirable on a considerable but not on a universal scale. And if the state will consent to 'go slow,' the end may be attained without appreciable risk to public credit and with every advantage to the common weal." Marriott, J. A. R., *op. cit.* Vol. 95, pp. 552-553.

^e Some doubtless will feel inclined to question this assertion, especially in view of the fact that public land can be purchased at any time during the period referred to at prices ranging from 12½ cents to many dollars per acre and that more than 250,000,000 acres (see report

of the Public Land Commission, 1905, p. 361) were disposed of for cash. Nevertheless the writer believes that the land system of a country must be interpreted in the light of its practical administration as well as its legal and theoretical aspects. Historically the fact seems well established that there was scarcely a time during the nineteenth century when land could not be had in the United States without money and without price. Mr. Treat in his *National Land System* (pp. 373 ff.) points out that, prior to 1820, "in most cases the lands were being located upon by squatters. And this serves to introduce a most interesting character whose position was gradually changing throughout these years. The squatter took up land in spite of the system and in order to bring him under it some sort of preemption was necessary. Enough has been said, therefore, to indicate that before 1820 the regulations for the sale of public lands affected only a portion, not more than a fourth at most, of the men who were engaged in the westward movement. . . .

"So during the half century of land legislation the squatter developed from a trespasser, a violator of the laws of the Union, to a public benefactor, a man whose bravery and whose sacrifices had opened great areas to peaceful settlement and who merited well of the nation. The 'actual settler' always received a certain sympathy in Congress. The land laws were stringent enough to punish intrusions upon the public domain, but remembering how frequently squatters hold lands even within our cities, it is easy to understand how difficult it was to enforce the laws prohibiting unlawful settlement along the thousands of miles of public land frontier. . . . It was not a pleasant role for Congressmen to denounce the squatters. They were law-breakers, to be sure, and yet in many cases they were very estimable criminals. And when the land revenue was no longer needed to help support the government, it became easy, even for Congressmen from the East and South, to favor more liberal treatment for the actual settler."

d White, *op. cit.* 1:527. The following is a copy of the Act.

Decree Number 70.

The Congress of the State of Coahuila and Texas has thought proper to decree:

Art. 1. The lands acquired by virtue of the colonization laws, whether general laws of the republic or private laws of the state, by native or foreign colonists, and by empresarios, shall not be subject to the payment of debts contracted previous to the acquisition of said lands from whatever source the said debts originate or proceed.

Art. 2. Until after the expiration of twelve years from having held legal possession, the colonists and empresarios cannot be sued, or incommoded by the judges, on account of said debts.

Art. 3. After the expiration of the term prefixed in the foregoing article, although they may be sued for said debts, they shall not be obligated to pay them in lands, implements of husbandry, or tools of their trade or machines, but expressly in fruits or money in a manner not to affect their attention to their families, to their husbandry or art they profess.

For its fulfillment the governor of the State shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th day of January, 1829.
(The names of the signers are not given in the book.)

e "With the close of reconstruction in Texas and the return of settled business and political conditions, the state entered upon an era of great activity in railroad construction. During the two decades from 1870 to 1890, more than eight thousand miles of railroad were constructed within the state, and our transportation system took on the shape it has since retained. In 1870, there were 500 miles of line in operation in the state; in 1890 there were 8,700 miles in operation. There were times during this period when construction was pushed forward with tremendous energy, as in the years 1881 and 1882 when nearly 2,800 miles of line, or more than 100 miles per month, were opened for traffic. There were other periods when owing to hard times, or possibly to reckless legislation, construction almost came to a standstill, as in the two years 1874 and 1875 when only 107 miles were put in operation, or the years 1883 and 1884, when 189 miles were open for traffic. The small construction in the last named years was due mainly to the repeal of the land grant acts and the reduction of passenger fares from five to three cents per mile, changes made by the legislature of 1882."—Potts, *op. cit.* pp. 40-41.

f Information on this point is somewhat contradictory. The following quotations illustrate partly the difficulty involved in making any exact statements as to the results that have been obtained in a financial way in our national land system: Dr. Ely, for instance, says (*Outlines of Economics*, 1908, p. 593), "More money has been spent for the purchase, survey and care of the public lands than has been received from their sale and lease."

Dr. Albert Shaw in his *Political Problems of American Development*, page 87, also says: "These lands cost the government including the cost of surveying and administration, about \$150,000,000 more than they brought into the treasury."

Dr. Albert Bushnell Hart, in his *Practical Essays in American Government*, page 241, after referring to Jefferson's expression of the hope that the public lands would liberate the national government from its debt, says: "It is true that the proceeds of the public lands did wipe out the last vestiges of the debt which had existed in 1787. It is true

that the lands had, up to June 30, 1883, brought into the treasury of the United States the smart amount of two hundred and thirty-three million dollars. It is equally true that, except for the period from 1830 to 1840, the lands have been a drain upon our finances. At the end of the financial year, 1882-3, the government was out of pocket so far as cash outlay and receipts are measures of the value of the lands, more than one hundred and twenty-six millions of dollars."

In the autumn of 1913 the writer addressed a letter of inquiry concerning this point to the Commissioner of the U. S. Land Office. In reply he received an itemized statement of expenditures and receipts of the federal government for the Public Domain which shows an excess of receipts over expenditures amounting to \$68,596,877.67. For a copy of this letter and statement, see Appendix I.

g The available school fund provided by the state consists of the income from the permanent school fund, one-fourth of all the state occupation taxes, a poll tax of one dollar levied on all male residents between the ages of 21 and 60 and a state levy of twenty mills on all real and personal property. For the year 1907-8 the apportionment from this fund was \$6, and for 1908-9 it was \$6.75 per capita for all children within the scholastic age. In 1908 the available school fund amounted to \$5,501,791.13. The part of this fund which was derived from the income of the permanent school fund amounted to \$1,214,941.32, or a little less than one-fifth of it. This is by far the greater part of all the income logically attributable to the proceeds from the sale of school land in frontier settlements and represents the annual return from what was paid to the state in the form of "un-earned increment." The remainder was obtained from taxation and necessarily must have come for the most part from the older and more thickly settled communities. But in the apportionment for the same year, 158 out of 243 counties received more from the state school fund than was collected from them in state taxes for school purposes. Some of them received two and even three times as much. Comptroller of Public Accounts, *Annual Report*, 1908, pp. vi and 119.

h Art. VII, sec. 6, Revised Statutes, 1911, p. xlii.

It is interesting in this connection to note the comment of Governor Pease in 1855 regarding the donation of public lands to counties for school purposes. He said: "The school fund may be greatly increased by a judicious use of the four leagues of land that have heretofore been granted to each county of the state for public schools. It is questionable whether these lands will ever accomplish much good, if they are allowed to remain in the possession of the counties, for it appears from information furnished by the commissioner of the General Land Office, that but 954,181 acres, of the 1,753,848, to which the ninety-nine counties of the state are entitled, have yet been selected.

Forty-one counties only have selected their full amount, twenty have selected 227,989 acres of the 354,240, to which they are entitled, and thirty-eight have made no selections, so that 799,307 acres yet remain to be selected. Nineteen of the counties which have made no selections were organized in 1846 or previous to that time, six were organized in 1848 and thirteen were organized at different periods between the years 1849 and 1854.....

It is unfortunate that these lands were not, at first, set apart to be managed by the state itself as a general fund for the common benefit of all the counties, for they would have been selected long since, in sections of the state where their value would have been greatly increased by the settlements since made." *Senate Journal*, 6th Legislature, page 15.

i Knight, George W., *Land Grants for Education in the Northwest Territory*, Publications of the American Historical Association, 1: 166. In regard to this subject the author says: "A law was enacted in 1842 providing that the associate judges should, on application of the purchaser, examine any school land purchased at eight dollars an acre or over, and appraise its value in its actual condition at the time when it was first bought. The difference between this appraised value and the contract price was to be credited to the purchaser. The only proviso was that the reduction should not be more than forty per cent of the price named in the contract. This remarkable law permitted every one who had purchased school lands between 1837 and 1841 to obtain his title by paying a lower price than he had voluntarily offered. Under its provisions the school fund was lessened over one hundred and seventy-five thousand dollars. The legislature was, indeed, generous. The law reminds one of the provisions in Ohio by which lessees were permitted to purchase lands at old and low valuations. All that the most tender-hearted and weak-headed sympathy could demand would have been yielded by permitting past contracts to be modified according to the true value of the land at the time of appraisement."

j The person desiring to purchase surveyed land subject to sale under this act is required to make a separate application in writing for each tract applied for and send it by mail and not by any one in person to the Commissioner of the General Land Office. This application must not be less than the value fixed by the Commissioner. It must also contain an affidavit of the applicant to the effect that he desires to purchase the land for a home or as land which he may properly and legally acquire in addition to that which he already owns, and that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation. The application must also be accompanied by the obligation of the applicant for a sum equal to the amount of a deferred payment. The envelope in

which this application is sent to the Land Office must have endorsed on it in proper form the following information: "Application to buy land; Section.....Block....., Grantee....., County....., Date on Market....." When an envelope thus endorsed is received at the Land Office, it must be securely preserved by the Commissioner or his Chief Clerk without being opened until the day following the date endorsed thereon as the one on which the land comes on the market. At that time all the applications are opened by the Commissioner or his Chief Clerk in the presence of the applicants or their representatives if they desire to be present and the land is awarded to the highest bidder.

k Commissioner of the General Land Office, *Biennial Report*, 1902, p. 37; see also State Treasurer, *Annual Report*, 1908, p. 34. The following table shows the number of acres leased at the various rates and the income derived therefrom:

Rate per Acre	Number of Acres	Rental
At 2 cents an acre.....	384,840	\$7,696.80
At 3 ".....	257,243	7,717.29
At 4 ".....	61,440	2,457.60
At 4½ ".....	119,040	6,356.80
At 5 ".....	378,560	18,928.00
At 6 ".....	14,080	844.80
At 7 ".....	825,022	57,751.54
At 8 ".....	32,000	2,560.00
Total.....	\$2,072,225	\$103,312.83

Average rate per acre, 4.9 cents.

The Board of Regents for the university in making up the estimate for the biennial period 1915-16 estimates the receipts from land leases at \$153,391.12 (*Biennial Report* 1912-14, p. 5).

l Bray, W. L., *Forest Resources of Texas*, Bulletin of United States Forestry Bureau, No. 47, 1904; p. 37. In discussing this subject the author says: "Here is at hand sufficient raw material to support for many years establishments for working up the forests into furniture, wagon timbers, implement handles, and all manner of things now shipped into the state from great distances. Yet the manufacturer can come none too soon for the utilization of this great timber resource. So rich is the soil, that clearing for settlement is outstripping the lumbermen. Field after field of unsurpassed forest is being deadened and destroyed merely to get rid of the trees. The best thing that can happen in the interest alike of the private owner and the state is

the rapid development of a market for this timber, which otherwise is likely to be largely wasted, although certain to be salable at a large profit within a few years, if the impatience of the owners to realize an immediate value could be restrained." See also Scott, John W., *Conservation of Mineral and Lumber Resources of Texas in The Land Problem of Texas*, pp. 102-107.

m Ibid., p. 42. Note also the tenor of the following statement: "It is plain from the survey of the prospects of private management of forests in Texas, that, in spite of the conditions favorable to its practice in many parts of the State and in spite of the hopeful beginning which has already been made towards introducing it in the longleaf pine territory, unaided private initiative will not suffice to protect the public interests affected by forest destruction. Under the lumbering methods now employed the pine forests are either ruined or so severely injured that their productiveness is greatly impaired. On the longleaf pine lands reforestation under present conditions is practically impossible. On loblolly and shortleaf lands reforestation is rapid enough, but the pine for the most part is replaced by scrub oak thicket. Fires and taxes remove the inducement to the forest owner to cut with reference to subsequent crops. The owners of small tracts and woodlots lack the knowledge required to make the most of their own holdings. Communities depend upon the maintenance of the forest cover for their water supply, or for protection against floods and silt, are exposed to the consequences of deforestation by land owners at a distance, acting solely with reference to their private interests. Left to themselves the forces now at work will result in an impoverishment of the resources of the state which it will soon be too late to prevent, and will produce conditions necessitating remedial measures at very heavy public expense."

n The following table shows number of tenants concerning whom information was obtained in 1913, and the average amount of property reported by them in four representative counties investigated by students in the extension department of the University of Texas.

County	Number of tenants	Average value of property
Robertson	117	\$311.92
Brown	103	318.59
Matagorda	38	353.00
Port Bend	108	272.03

For further reference see *Studies in Farm Tenancy*, *op. cit.* pp. 36-47 and *Land Problem*, *op. cit.* pp. 16-20.

BIBLIOGRAPHY

- Alden, Percy. *Democratic England*. New York. 1912.
- Baneroft, Hubert H. *North Mexican States and Texas*. 2 Vols. San Francisco. 1889.
- Bogart, E. L. *Economic History of the United States*. Revised edition. New York. 1913.
- Cobden Club. *Systems of Land Tenure in Various Countries*. London. 1870.
- Dallam, James Wilmer. *Digest of the Laws of Texas*, "containing a full and complete compilation of the land laws." Baltimore. 1845.
- Donaldson, Thomas. *The Public Domain, Its History with Statistics*. Washington. 1884.
- Ely, Richard T. *Evolution of Industrial Society*. New York. 1903.
- Ely, Richard T. *Outlines of Economics*. Revised and enlarged edition. 1908.
- Ely, Richard T. *Property and Contract in Their Relation to the Distribution of Wealth*. 2 Vols. New York. 1914.
- English Statutes*, 55 and 56 Victoria, 1892; 6 Edward 7, 1906; 7 Edward 7, 1907; and 8 Edward 7, 1908. London.
- Gammel. *Laws of Texas*. "This is a reprint in twelve volumes of all laws, ordinances and constitutions adopted by the Republic of Texas and by the state of Texas down to and including the Acts of the Special Session of the 27th Legislature in 1901."
- Garrison, George P. *Texas*. New York. 1903.
- Goodnow, Frank J. *Social Reform and the Constitution*. New York. 1910.
- Gouge, William M. *The Fiscal History of Texas*. Philadelphia. 1852.
- Haney, Lewis H. (ed) *The Land Problem in Texas*. Bulletin of the University of Texas. Austin. 1915.

- Hart, Albert Bushnell. *Practical Essays in American Government*. New York. 1905.
- Hill, James J. *Highways of Progress*. New York. 1910.
- Hirschl, Samuel D. *Business Law*. Chicago. 1915.
- Knight, George W. *Land Grants for Education in the Northwest Territory*. Papers of the American Historical Association. Vol. I. Pp. 73-175. 1885.
- Lane, J. J. *History of Education in Texas*. Washington. 1903.
- Secretary of State. *Laws and Decrees of the State of Coahuila and Texas in Spanish and in English*. Houston. 1839.
- Le Rossignol, James Edward. *State Socialism in New Zealand*. New York. 1910.
- Levy, Hermann. *Large and Small Holdings in England*. Translated by Ruth Kenyon, "with considerable additions by the author." Cambridge. 1911.
- Merchants Association of New York. *The Natural Resources and Economic Conditions of the State of Texas*. New York. 1901.
- Oldham, William S. and White, George W. *Digest of General Statutes of Texas*. Including colonization laws. Austin. 1859.
- Palgrave, Sir Inglis. *Dictionary of Political Economy*. 3 Vols. London. 1910.
- Parker, Sir Gilbert. *The Land, The People, and The State*. London. 1910.
- Potts, Charles S. *Railroad Transportation in Texas*. Bulletin of the University of Texas. No. 119. Austin. 1909.
- Revised Civil Statutes of Texas*. Austin. 1895.
- Revised Civil Statutes of Texas*. Austin. 1911.
- Sanborn, John Bell. *Congressional Grants of Land in Aid of Railways*. Bulletin of the University of Wisconsin. No. 30. Madison. 1899.
- Sato, Shasuke. *History of the Land Question in the United States*. Johns Hopkins University Studies. 4: 263-439. 1886.
- Sayles, John and Henry. *Early Laws of Texas*. 3 Vols. St. Louis. 1891.
- Sayles, John and Henry. *Real Estate Laws of Texas*. 2 Vols. St. Louis. 1890.

- Sayles, John and Henry. *Civil Statutes*. 2 Vols. St. Louis. 1897.
- Shaw, Dr. Albert. *Political Problems in American Development*. New York. 1907.
- Studies in the Land Problem of Texas*. Bulletin of the University of Texas. No. 39. Austin. 1915.
- Studies in Farm Tenancy in Texas*. Bulletin of the University of Texas. No. 21. Austin. 1915.
- Swift, Fletcher Harper. *A History of Public Permanent Common School Funds in the United States, 1795-1905*. New York. 1911.
- Taylor, H. C. *The Decline of Landowning Farmers in England*. Bulletin of the University of Wisconsin. Madison. 1904.
- Treat, Payson J. *The National Land System, 1785-1820*. New York. 1910.
- Van Hise, Charles R. *The Conservation of Natural Resources in the United States*. New York. 1910.
- White, Joseph M. *Land Laws in California, Oregon, Texas, etc.* 2 Vols. Philadelphia. 1839.
- Wooten, Dudley G. *A Comprehensive History of Texas, 1685-1897*. 2 Vols. Dallas. 1898.
- Yoakum, Henderson K. *History of Texas*. 2 Vols. New York. 1856.

PERIODICALS

- Barker, E. C. *The Finances of the Texas Revolution* in Political Science Quarterly. 19: 612-635. 1904.
- Breckenridge, Maj. John T. *Evils of State Landlordism* in Texas Review. 1: 475. 1886.
- Cheyney, Edward P. *Recent Tendencies in the Reform of Land Tenure* in The Annals. 2: 320.
- Fay, C. R. *Small Holdings and Agricultural Cooperation in England* in Quarterly Journal of Economics. 24: 499-514. 1910.
- Granberry, J. C. *The Land Problem in Texas and the Remedies Proposed* in The Survey. 32: 394. 1914.

- Haney, L. H. *Farm Credit Conditions in a Cotton State* in *American Economic Review*. 4: 47-67. 1914.
- Jameson, T. *Hope of Small Farm Holdings Under a New System* in *Nineteenth Century*. 73: 156-176. 1913.
- Lincolnshire. *Rival Land Policies in Nineteenth Century*. 71: 1134-1146. 1912.
- Marriott, J. A. R. *Evolution of the English Land System* in *Fortnightly Review*. N. S. 94: 460-475, 708-722, and 1112-1128. 1913. Also N. S. 95: 539-553. 1914.
- Parker, Sir Gilbert. *A Word for Small Ownership* in *Nineteenth Century*. 72: 421-31. 1912.
- Sanborn, John Bell. *Some Political Aspects of Homestead Legislation* in *American Historical Review*. 6: 19-37. 1900.
- Texas Homestead Laws* in *Texas Review*. 1: 372-376. 1885.
- Criticism of the Use of Public Land as a Source of Revenue* in *Texas Review*. 1: 184. 1885.
- Accounts of the Agitation for Railways and Other Works of Internal Improvement* in *Texas State Gazette*. Austin. 1850-55.
- Zartman, Lester W. *Mistakes in State Regulation of the Insurance Business* in *Yale Review*. 17: 28. 1908.

DOCUMENTS

- Baker, Mosely. *Reports as Chairman of the Judiciary Committee*. Nov. 16, 1836. *House Journals*. 1836-38. p. 155.
- Bell, Gov. P. H. *Annual Message*. Nov. 10, 1851.
- Board of Agriculture and Fisheries. *Agricultural Statistics for England*. Vol. 43, part 1. 1908.
- Board of Agriculture and Fisheries. *Annual Report, Part I, Small Holdings*. 1914. (ed. 7851)
- Board of Regents of the University of Texas. *Biennial Report*. 1912-14.
- Bray, W. L. *Forest Resources of Texas*. *Bulletin of the United States Forestry Bureau*. No. 47. 1904.
- Burnett, President David. *Message to Congress*. 1836.
- Capitol Building Commission. *Final Report*. Austin. 1883.

- Commissioner of the General Land Office. *Biennial Reports*. Especially for the following dates: 1886, 1898, 1900, 1902, 1904, 1906, 1908, 1910, 1912, 1914; and also the special report of 1899. Austin.
- Commissioner of the School and Public Lands, South Dakota. *Tenth Biennial Report*. Pierre. 1908.
- Commissioner of University and School Lands, North Dakota. *Eighth Biennial Report*. Bismarck. 1908.
- Comptroller of Public Accounts, Texas. *Annual Report*. Austin. 1908.
- Elder, F. S. *School Lands of Oklahoma*. Privately published. 1902.
- Houston, President Sam. *Annual Message*. 1837.
- Lanc, Franklin K. *Annual Report, U. S. Department of Interior*. Washington. 1915.
- Pease, Gov. E. M. *Annual Message*, November 6, 1855. Senate Journal, 6th Legislature, p. 15.
- Phillips, W. B. *The Mining Laws of Texas*. Bulletin of the University of Texas. No. 21. Austin. 1903.
- Robertson, J. B., Chairman of the Senate Committee on Railroads. *Report*. Texas State Gazette. Austin. January 12, 1850. P. 165.
- Runnels, Gov. H. R. *Message, December 27, 1858*. Bound Volume of Governors' Messages. Austin.
- Select Committee of the Senate. *Report*. Senate Journal. 1856. P. 387.
- Senate Committee on Internal Improvements. *Majority Report*. Senate Journal, 5th Legislature.
- Senate Committee on Internal Improvements. *Minority Report*. Senate Journal, 6th Legislature, pp. 101-2.
- State Treasurer, Texas. *Annual Reports*. 1908, 1914.
- Statistisches Jahrbuch für das Deutsche Reich*. 1909.
- Wisconsin Historical Library. *Miscellaneous Pamphlets*. Vol. 1. Contains among many other documents a copy of the charter for the Texas Western Railway Company, the circular issued by this company to its stockholders in 1856, and an address relating to the Galveston Bay and Texas Land Company, 1831.

Throckmorton, J. W. Chairman of the House Committee on Internal Improvements. *Report*. House Journal, Sixth Legislature, p. 405.

United States Census Reports.

United States Commissioner of Education: *Annual Report*. 1908.

United States Public Lands Commission. *Final Report*. Washington. 1905.

LEADING CASES

Colquit, Tigner Mining Co. v. Rogan. 68 S. W. 154. 1902.

Cowan v. Hardeman. 26 Texas 217. 1862.

Davis v. Gray. 16 Wallace 203. 1872.

Franklin v. Kesler. 25 Texas 138. 1860.

Heil v. Martin. 70 S. W. 430. 1902.

Hogue v. Baker. 92 Texas 58. 1898.

Galveston County v. Tankersley. 39 Texas 651. 1873.

Galveston, Harrisburg and San Antonio Ry. Co. v. State. 77 Texas 367. 1890.

Galveston, etc., Ry. Co. v. State. 81 Texas 572. 1891.

McMullen v. Hodge. 5 Texas 34. 1849.

State v. Delesdenier. 7 Texas R. 76. 1851.

Slate v. Howard. 21 Texas 416. 1858.

Schendell v. Rogan. 63 S. W. 1001. 1901.

Woods v. Durrett. 28 Texas 429. 1866.

THE IMMUNITY OF PRIVATE PROPERTY FROM
CAPTURE AT SEA

BY

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INTRODUCTION

A proposal of immunity from capture at sea for all private property not subject to the law of contraband or blockade was seriously debated by a Commission of the Second Hague Conference. The proposal originated with the Government of the United States which has, from its foundation, advocated complete inviolability for commerce in time of war. Contemporary publicists have given considerable attention to the question, and various bodies, both public and private, have within recent years passed resolutions in favor of immunity. The war now in progress furnishes an unparalleled criterion of the value of existing legal limitations upon the right of capture and an index of the prospect for complete immunity.

This conjunction of circumstances favorable to an investigation of the status of private property in maritime warfare occurs at a time when no historical presentation of the subject in English exists. The treatise of Professor Charles de Boeck, *De la propriété privée ennemie sous pavillon ennemi*, published at Paris in 1882, is an exhaustive exposition of the material available up to that date. The rarity of this scholarly work as well as the valuable store of fact and opinion which it contains have appeared to justify a considerable number of references to it. The majority of writers, however, tend to treat the subject either theoretically or from the viewpoint of the present advantage of immunity to a particular country. Both methods of approach lack the essential background of history. Considerations of theory, history and policy all enter into any sound conclusions upon the present question.

Immunity means the freedom of enemy ships and of enemy goods on board from liability to confiscation. The significance of the problem which is involved in the effort to establish im-

munity in international law becomes clearer after examination of the stages through which the right of capture has passed from the time when limitations upon it began to be introduced. Practice under the existing rules calculated to protect neutral ships, neutral goods and enemy goods on neutral ships affords reliable guidance to those who would determine the value of proposed rules to protect enemy ships and their enemy cargoes.

The writer's principal aim is to explain the tendencies of both the practice and theory of the law of private property in war at sea: to determine how far belligerent states observe the law and how far the exponents of immunity are warranted in anticipating an accomplishment of the reform they desire. It goes without saying that the material for a proper treatment of the present war on commerce is as yet unavailable. The main lines of the systems devised by the Allied and by the Central Powers for the *control* of enemy trade were discernible by July, 1915, and they are presented as developed up to that time. But the conclusions reached rest upon an investigation of practice since 1856.

The phrase, "Freedom of the Seas", has borne different meanings in different periods. Today its meaning varies with the country in which it is discussed. The treatment of private property is a necessary element in any conception of the phrase, and the importance of any endeavor to give unbiased, non-propagandist consideration to this vital subject is manifest.

THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

CHAPTER I

THE EARLY HISTORY OF THE LAW OF CAPTURE

“ Dans l’antiquité, les règles de la guerre sur mer sont d’une simplicité élémentaire; la force regne seule . . . rien ne met obstacle au déchaînement des passions et à la violence de leurs manifestations.”¹ Previous to the fourteenth century, regulations of maritime warfare were few and scattered. The *Tables of Amalphi*, compiled about the sixth century A. D., are regarded by certain authorities as the first attempt at a code of maritime law.² The *Rooles d’Oleron*, dating from the thirteenth century, did not deal with the usages of war at sea.³ Not until the latter part of the next century did there appear at Barcelona the famous compilation known as the *Consolato del Mare*, upon which any study of the customs and laws of maritime war must depend for its references to origins.⁴ Containing provisions derived from Greek and Roman law, from French, Spanish, Syrian, Venetian, and Genoese practice, and from observances of the island states of the Mediterranean, the *Consolato* was accorded a general recognition amongst the commercial powers.

¹ Nys, Ernest. “Une page de l’histoire de la mer” in *Revue de droit international*, 2e série, T. II, 1900, p. 62.

² Verræes, F., *Les lois de la guerre et la neutralité* (Brussels, 1906), I. The laws of the Rhodians dating from the second century A. D. contain no mention of the rules of capture.

³ Twiss, Travers, *Law of Nations* (Oxford, 1863), II, p. 146.

⁴ Although not drawn up in the form known today until the fourteenth century, it was the expression of usages dating back several centuries. Different authorities date the *Consolato* as early as the twelfth century.

It left to the "common sense" of the commanders of public ships the proper course to pursue when an enemy ship with an enemy cargo on board was encountered.⁵ On the other hand, while enemy property on neutral ships was subject to capture, the neutral shipmaster was to recover his freight, and only in case he refused to convey the enemy cargo to a designated place of safety might the captor sink the vessel. Conversely, neutral goods on board an enemy vessel were free from capture. This conclusion is drawn from the following stipulation of Chapter CCXXXI:

"And if by chance the said ship or vessel be enemy's property, and the cargo on board the said ship or vessel be the property of friends, the merchants who shall be on board the said ship or vessel and to whom the cargo shall belong either in whole or in part, ought to come to an arrangement in respect of the said ship, which is good prize of war, with the said admiral"⁶

The same chapter further stipulates for damages to the merchants in case they, being willing to agree, lose their cargo by reason of its being "sent away" by the captor.⁷

The *Consolato del Mare* remained until the middle nineteenth century the common law of the Mediterranean, and extended its influence into the Atlantic. Being expressed as general rules, it is to be expected that states will have, by mutual agreement, provided special rules for special circumstances. It will be found also that such special rules have come into so frequent use at different periods as to have taken upon themselves the appearance of general customs and to have been set up by states, in whose interest such action was, as rules of more general and binding force than the rules of the *Consolato*. The most useful guide to a safe conclusion upon the question of the law of capture at sea prior to the Declaration of Paris is the study of the attitudes taken by the greater maritime powers, as shown by their treaties, by their practices in war, and by the opinions of publicists. To arrive at a clear comprehension of the gradual development of moderating elements leading up to the rules

⁵ Twiss, Travers, *The Black Book of the Admiralty* (London, 1874), III, pp. 539-547.

⁶ Twiss, *The Black Book of the Admiralty*, III, pp. 539-547.

⁷ *Ibid.*, p. 545.

proclaimed in 1856 it will be advisable to consider each state separately. And although governmental action and the opinions of the various sorts of private interests and authorities react upon one another and progress together, there will be greater certainty as to what is law and what is theory at any given period in any given state if the two are treated separately. That the questions of neutral property and enemy property are closely intermingled, the former sometimes protecting the latter, the latter at other times incriminating the former, necessitating their being studied concurrently, will appear as the discussion proceeds.

I. ENGLISH PRACTICE PREVIOUS TO 1854

So consistently has England in modern times upheld the rules of the *Consolato del Mare*, recognizing the justice of exempting from the effects of war the goods of those "qui in bello medii sunt", while refusing to relieve private enemy individuals of any of the harsh consequences of the struggle, as to have fixed upon the *Consolato* the name of the "English Rule". It is difficult, however, to accept the assertion of Manning, when, after a survey of the English treaties prior to 1600, he declares that they are all uniformly "in support of the *Consolato del Mare*."⁸ The statement of Westlake—that "it is more likely that the currency of that document embraced the Atlantic as well as the Mediterranean ports of the Spanish peninsula, and that these obtained the adoption of their system in their treaties with England, than that the latter country spontaneously took up for a few years a line to which neither its earlier nor its later manifestations during the middle ages point"⁹—more nearly follows the records of the agreements during the mediaeval period. Only two treaties, that of 1351 with Biscaye and Castile,¹⁰ and that of 1353 with certain Portuguese cities,¹¹ provide for freedom of neutral goods from capture on enemy ships. The treaties which contain agreements to refrain from the transportation

⁸ Manning, *Law of Nations*, edited by Sheldon, Amos, (London, 1875), p. 315.

⁹ Westlake, John, *International Law* (Cambridge, 1907), II, pp. 123-125.

¹⁰ Rymer, *Foedera* (The Hague, 1741), III, 1, p. 71.

¹¹ *Ibid.*, p. 88.

of enemy goods are numerous. England observed with unflagging consistency the rule of capture of enemy goods wherever found, whence the necessity and the value of such treaties as that of 1406 between Henry IV of England and the Duke of Burgundy, in that period Count of Flanders.¹² This agreement was modelled upon that of 1370 by which, in order to guard against the necessity of submission to search, the Duchy of Flanders agreed that its subjects should be forbidden to carry the goods of England's enemies and England agreed to receive Flemish passports, certifying to the innocent cargo of Flemish merchant vessels.¹³ In 1373 the English king applied the principle of the freedom from capture of neutral vessels by returning to Portuguese owners a vessel which had been found to be carrying enemy property.¹⁴

The Anglo-Burgundian treaty of 1406 was renewed in 1417 with the addition of a new clause.¹⁵ England, then at war with Genoa, would confiscate Flemish goods (neutral) found on Genoese vessels. This rule will appear later in company with that rendering all goods free on neutral vessels. In the treaty here mentioned it is directed only against neutral goods on Genoese vessels, and it necessarily lost all force upon the close of the war with Genoa. The treaty of 1406 was renewed in 1446,¹⁶ 1467,¹⁷ 1478,¹⁸ and 1495¹⁹ without mention of such a clause as that added in 1417. In 1461, however, an English statute made neutral property on enemy ships good prize,²⁰ and in 1468 a treaty with Brittany, renewed in 1486, permitted confiscation of all goods found upon enemy prizes.²¹ The treaty clauses provide first that no goods of English or Breton merchants ta-

¹² *Ibid.*, IV, 1, p. 3: "les Marchans, Maistres des Niefs et Maronniers de dit Pais de Flandres, ou demourans en Flandres, ne amesront pur fraude ne coleur quelconque, aucune Biens ou Merchandises des Ennemis des Englis par Mer."

¹³ Rymer, *Foedera*, III, 2, p. 172.

¹⁴ *Ibid.*, 3, p. 4.

¹⁵ *Ibid.*, IV, 3, pp. 13, 30.

¹⁶ *Ibid.*, V, 1, p. 165.

¹⁷ *Ibid.*, 2, p. 151.

¹⁸ *Ibid.*, 3, p. 88.

¹⁹ *Ibid.*, 4, p. 85.

²⁰ 20 Henry VI (1461-2), cited by Westlake, II, p. 124.

²¹ Rymer, V, 2, p. 161; Renewal, V, 3, 178.

ken as prizes on sea or river and brought into the ports or harbors of either country should be sold or alienated; secondly, that such property coming from either country and going to a country not hostile to either should not be stopped nor disturbed in the ships of any country; thirdly, that the merchants of neither country should transport the goods of the other's enemies: Then occurs the following article:

"Et, par ce qui dit est par ce present Traietie, n'est pas Entendu, que, si les Gens du Pais de Bretagne mettoient leurs Parsones, Biens, ou Marchandises en Navires de Partie d'Ennemie de Nous & de Nous Pais & Royaume d'Angleterre, non aians saufconduit de nous ne esteans en Truez ou Abstinans de Guerre avesquez Nous, Que lez Gens du dit Partie d'Angleterre ne puissent prander & acquerir a eulx les Parsonnez et Biens, qu'ilz pranderont dedans le Navires Ennemie de Party de Nous & de nostre dit Pais & Royaume d'Angleterre; & aussi pourront les Gens du Party de Bretagne prandre & acquerir a eulx les Parsonnes & Biens du Partye d'Angleterre, qu'ilz troveront en Naviers Ennemie de dit Pais & Duchie de Bretagne, non ayans saufconduit *du dit Duc*, ne esteans en Treus ou Abstinans de Guerre ovesquez Luy, ainssi qu'il est dit de ceulx de Party d'Angleterre; mais les Gens de chescune Party purront Mener & Remener par Meer & par Terre, Rivers, & Eaus douces, les unez d'eulx en Party de l'autre, & chescune d'eulx en son Party, lez Biens de Gens qui ne serront Ennemie de l'autre Partie, sans ce qu'ilz en soient Empeches, ne que lez Gens d'une Party leur y portent Dammage en aucune manier."

Peillon appears to err in two respects regarding this treaty, in ascribing it to 1463, for which year there occurs in Rymer's collection no account of any Anglo-Breton treaty, and in asserting that it marks a backward step in that it makes neutral property aboard an enemy ship good prize.²² The *pas en arrière* had, as has been shown, been taken much earlier.

During the next century the English practice varied. In 1545 an "absolutory" decree was handed down from the High Court of Admiralty, confiscating a cargo of neutral property which consisted of cloth and other non-contraband articles ta-

²² Peillon, E., *La Propriété privée ennemie* (Paris, 1910), p. 27. His comment upon the treaty does not indicate an entirely unprejudiced viewpoint: "L'Angleterre, qui prévoit déjà ses destinées maritimes, invente le principe nefaste qui corrompra le droit de toute la période suivante et laissera des traces jusqu'au XIXe siècle: Navire Ennemi confisque robe d'amir".

ken on board a vessel proceeding from Bordeaux to Rouen.²³ In 1557 an Order in Council made, as against France, neutral property on enemy ships good prize and added the still more retrograde rule confiscating neutral ships for the carriage of enemy goods. The observance of this Order had ceased before the end of the century, as in the case "S. D. N. R. e. prize goods of the Lyon's Whelp", Spanish goods being enemy were condemned to the Crown but the neutral French carrier was released.²⁴ Gradually also the rule against neutral property on enemy ships was relaxed until in the early seventeenth century the *Consolato* had become the general source for the Court of Admiralty. As late as 1602, however, an English decision condemned the property of neutral Venetians captured with a Portuguese vessel;²⁵ thus by treaty and practice prior to the seventeenth century, English leanings were rather away from than toward the *Consolato* principle of freedom to neutral goods wherever found.²⁶

Boeck comes to the conclusion that during the fourteenth and fifteenth centuries the rules of the *Consolato* were generally

²³ Insano c. Elsdon, *Select Pleas in the Court of Admiralty*, Vol. I, No. 66: Selden Society Publications, Vol. VI, pp. 138, 235; *Select Pleas*, Vol. II, No. 66, Selden Society Publications, Vol. XI, p. lxxvi. Mr. Reginald G. Marsden, the editor of Volumes VI and XI of the Selden Society Publications, in which the cases are collected for the years 1390-1404, 1527-1545 and 1547-1602, suggests the possibility that the statute of 1461 had been revived in retaliation for the French rules and practice. This suggestion is strengthened by the English Order of 1557, noted by Westlake, p. 126, which provided that as against Frenchmen enemy ships should confiscate neutral goods on board and enemy goods neutral ships in which they were being carried. This according to the Order was due to the fact that France "put the same in execution against the subjects of this realm".

²⁴ *Select Pleas*, II, No. 215, Selden Society Publ., XI, p. lxxiv.

²⁵ *Select Pleas*, II, No. 155, Selden Society Publ., XI, p. lxxv.

²⁶ "There are many other indications that the reign of international law was beginning (after 1625); the practice of other nations in matters of prize is constantly referred to, and the judge, Sir Henry Marten, is found protesting against being called upon by the Admiral or the Council to condemn as prize ships and goods which in his judgment ought to be restored." Marsden, R. G., in *Records of the Admiralty Court*, R. H. S., New Series, XVI, p. 79. In contrast to this development were the Orders in Council of 1625 and 1626, which rendered subject to condemnation neutral ships carrying contraband, though not captured until on their return journey. And in 1689 England and Holland combined to interdict all commerce with France. Dumont, Jean. *Corps universel diplomatique du droit des gens* (Amsterdam, 1726-31), VII, 2, p. 238.

followed by the countries of Western Europe. He is unable, however, to cite any treaties other than those of 1351 and 1353 above mentioned which in specific terms grant immunity to neutral property on enemy ships. Like other writers, he appears to consider the consistent English practice of capturing enemy goods wherever found as sufficient evidence of the observance of the *Consolato*, whereas the fate of neutral property is the more important from the point of view of progress. And while in a more advanced period, treaties are to be regarded not as embodying international law but as creating exceptions to it, in an earlier stage of legal development, we are apt to find such law as exists at all embodied in treaties. If this view be correct, the comparatively large number of treaties which either made no mention of the treatment to be accorded neutral property in enemy ships or provided expressly for its liability to confiscation form a body of evidence against the generally accepted view.

Boeck accepts the statement of Ward in *A Treatise on Relative Rights and Duties* that in seven commercial treaties of the sixteenth century England did "not derogate from" the *Consolato* rules. To this we have to oppose the facts of English practice in that century noted by Westlake. We have also the statement of Manning (pp. 314-315) that in no commercial treaties between 1495 and 1604 was the subject of capture mentioned. Ward evidently considered no mention equivalent to upholding the *Consolato*. But this is contradicted by Westlake's *exposé* of the practice of the sixteenth century.²⁷

It is generally held that from the early part of the seventeenth century, in the absence of treaty clauses to the contrary, the English Court of Admiralty applied the rules of the *Consolato*. The influence of the Dutch, exerted toward and hastening that development, was to go further and lead to treaties by which England in exchange for the right to capture neutral goods on enemy vessels, gave up the right to capture enemy

²⁷ de Boeck, Charles, *De la propriété privée ennemie* (Paris, 1882), pp. 32-34.

goods, not contraband, on neutral vessels. Her first treaty containing such stipulations was signed with Portugal in 1654.²⁸

In 1667 a similar agreement was made with Holland.²⁹ The provisions, as found identically in the treaty between England and Spain of the same year, were:

XXI. "The Subjects and Inhabitants of the Kingdoms and Dominions of the Most Serene Kings of Great Britain and Spain respectively, shall with all security and liberty, sail to and traffic in all the Kingdoms, Estates, or Countries, which are or shall be in Peace, Amity, or Neutrality, with the one or the other.

XXII. And they shall not be disturbed or disquieted in that liberty by the Ships or Subjects of the said Kings respectively, by reason of the hostilities which are or may be hereafter between either of the said Kings and the aforesaid Kingdoms, Countries, and States, or any of them which shall be in friendship or neutrality with the other.

XXIII. And in case that within the said Ships respectively be found by the abovesaid means, any merchandise hereunder mentioned, being of contraband and prohibited, they shall be taken out and confiscated, before the Admiralty or Other Competent judges; but for this reason the Ship, and the other free and allowed commodities which shall be found therein, shall in no wise be either seized or confiscated.

XXIV. It is also agreed, that whatsoever shall be found laden by the Subjects or Inhabitants of the Kingdom and Dominions of either of the said kings of England and Spain aboard the Ships of the Enemies of the other, though it be not forbidden merchandise, shall be confiscated, with all things else which shall be found within the said Ships, without exception or reserve."³⁰

It is asserted by Mr. L. A. A. Jones that from that date until 1796 in but one (that of 1670) of thirteen treaties signed between England and Spain were the new rules lacking. The same writer considered that these rules were still in force between Great Britain and Spain in 1907 in view of the failure of Spain to accede to the Declaration of Paris. His conclusion was invalidated only in 1908 when Spain announced her accession to the Declaration.³¹

²⁸ *British and Foreign State Papers*, I, p. 488.

²⁹ Dumont, VII, 1, p. 49.

³⁰ *British and Foreign State Papers*, I, pp. 572-573.

³¹ Jones, L. A. A., *Commerce in War* (London, 1907), p. 296. It may be noted in support of Mr. Jones' statement that although Spain and France made peace in 1795, it was not until August of 1796 that they entered into a treaty of alliance. Hence the following provision of the treaty of 1814

In eight treaties with France and in five with the United Provinces, all prior to the nineteenth century, England agreed to the Dutch principles. The most famous of these treaties was that of Utrecht.³²

On the other hand, in English treaties with weaker states such as Denmark, Brandenburg, Sweden, and Savoy, the rules of the *Consolato* were either expressly stipulated, or, by the express exclusion of the new rules, the old rules were left in force.³³ During the war with France which began in 1744 English courts had condemned the goods of French enemies on board neutral Prussian vessels. In the subsequent Silesian Loan Controversy, in which for the first time the claim to legal immunity for enemy property in friends' vessels was advanced (by the Prussian government), the British memorialists maintained as an undoubted principle of the law of nations, the right to capture the goods of an enemy wherever found, in the absence of a treaty specifying a different procedure.³⁴

In the Seven Years War England had to deal with a neutral with whom she had treaties providing for the new principles.

between Great Britain and Spain: "It is agreed that, pending the negotiation of a new Treaty of Commerce, Great Britain shall be admitted to trade with Spain upon the same conditions as those which existed previously to 1796. All the Treaties of Commerce which at that period subsisted between the 2 nations being hereby ratified and confirmed". (British State Papers, 1, p. 292.) Manning was therefore in error in affirming (p. 348) that none "of the treaties by which Great Britain had formerly engaged herself to maintain the principle that 'free ships make free goods' [was] renewed at the general peace". Westlake also overlooked the 1814 treaty with Spain since he states (p. 128) that "the last occasion on which [England renewed her stipulations of Utrecht] was that of her commercial treaty with France in 1786".

³² Dumont, VIII, I, pp. 348, 349, 379, 380.

³³ For collected treaties with brief comments see Manning, pp. 312-351.

³⁴ For complete treatment of this question, see Marten's *Causes célèbres du droit des gens*, II. Cause première; also Satow, Sir E., *The Silesian Loan and Frederick the Great* (London, 1915). The British reply to the Prussian memorial may be found in *State Papers*, XX, pp. 889-907. On p. 889 the law of the case is stated thus: "When two Powers are at war they have a right to make Prizes of the Ships, Goods, and Effects of each other upon the High Seas. Whatever is the property of the Enemy may be acquired by capture at Sea; but the property of a Friend cannot be taken, provided he observes his Neutrality." On p. 892: "Particular Treaties too have inverted the rule of the Law of Nations and by agreement declared the goods of a Friend, on board the ship of an Enemy to be Prize; and the goods of an Enemy on board the Ship of a Friend, to be free, as appears from the Treaties already mentioned and many others."

France, weaker upon the sea than her rival, authorized the ships of Holland to carry her colonial products for her. As Boeck says: "La politique commerciale du XVIIIe siècle reposait sur le monopole colonial."³⁵ By imposing upon this trade the rule that trade closed to a country's merchant marine in time of peace was illegitimate in time of war, England "beat the devil around the bush" in the face of Anglo-Dutch treaties, and enforced, instead, the ancient *Consolato* rules.

The British contention which evoked the Armed Neutrality of 1780 was the same as that declared by Lord Mansfield and his fellow-memorialists in 1753. The continental Powers, among other articles of their manifesto, affirmed: "That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband."³⁶ No counter proposal such as had been customary in treaties, permitting confiscation of neutral goods in enemy ships, and thus making the flag cover the cargo whether enemy or neutral, was made. The Neutrality Powers were not inclined to withdraw from the higher standard set by the *Consolato* and observed by England. The British replies to Denmark and Sweden noted the existence of treaties with both those powers providing expressly for the observance of the old principles.³⁷ To Russia, the British Cabinet declared that

"his Majesty hath acted towards friendly and neutral powers according to their own procedure respecting Great Britain, and conformably to the clearest principles generally acknowledged as the Laws of Nations, being the only law between powers where no treaties subsist, . . . that precise orders had been given respecting the flag and commerce of Russia, according to the Laws of Nations and the tenor of our treaty of commerce."³⁸

With Holland there existed a treaty containing the new rules. By declaring war against her before she could accede to the Neutrality, Great Britain placed the United Provinces as well as France outside the circle of neutral countries, with whom

³⁵ Boeck, p. 53.

³⁶ Martens, *Rec.* III, Art. 2, p. 159.

³⁷ Martens, *Rec.* III, pp. 182-183; 188-189.

³⁸ *Ibid.*, pp. 160-161. Manning mentions the treaty of 1734 with Russia, stipulating the old rules. Dumont, *Supp.* (Amsterdam, 1739), II, 2, p. 495.

alone, as Westlake points out, such treaties can be operative.³⁹ With Prussia and the Two Sicilies the nonexistence of treaties covering the question left simply the common law of the *Consolato* between them and Great Britain. From the English point of view the law of the controversy, both customary and as expressed by treaty, was clear. Whether England was justified in regarding the *Consolato* as the common law of the sea will appear after a consideration of Continental treaties and practice.⁴⁰

Between the first and the second Armed Neutralities, Great Britain ratified two important treaties containing the principle that the flag covers the cargo, those of 1783⁴¹ and of 1786,⁴² both with France, the latter being the last treaty in which she stipulated for that principle.

The Armed Neutrality of 1800, induced by other related causes, included in the body of principles promulgated, the second rule of the manifesto of 1780,—free ships, free goods.⁴³ At this time England was better prepared to maintain her own doctrine, and the combined influences of the battle of Copenhagen and of the change of sovereigns in Russia led to the Russo-British treaty of June 5–17, 1801, to which Denmark and Sweden later acceded.⁴⁴ By it the rule of the *Consolato* permitting confiscation of enemy goods in neutral ships was upheld. England, constrained by political expediency, first to make engagements to respect neutral property in enemy ships, later to grant immunity by conventional agreement to enemy property

³⁹ Westlake, p. 128. Such a treaty always regards the co-contractants as being in the relation of belligerent and neutral. They agree, in case one party gets into war, to permit the other party, being neutral, to transport enemy goods not contraband without liability to capture and on the other hand it is provided that the goods of either being neutral, will be capturable on enemy ships. Thus the practice of England in the wars of the period in which she had such treaties, approximately between 1650 and 1785, was to apply the rules of the *Consolato*, although she had treaties specifying the Dutch rules with the more important maritime powers.

⁴⁰ Peillon says: "La Grand-Bretagne dut acquiescer au principe qui avoit coalisé contre elle toute l'Europe." (p. 34.) The general opinion of writers is quite to the contrary. Manning says: "Our government never once acceded to the principles therein put forward . . ." p. 337.

⁴¹ Martens, *Rec.* III, p. 521.

⁴² *Ibid.*, IV, pp. 168, 172.

⁴³ *Ibid.*, VII, p. 176, Art. 2.

⁴⁴ *Ibid.*, VII, pp. 260–281. (For the three treaties.)

in neutral ships, did not revert to her early policy of indiscriminate capture of all goods found on enemy ships, but, having won assured maritime predominance, used her power to force consent to the rule of the *Consolato* respecting enemy property. She was justified in that course by the readiness with which Russia in 1793 agreed with her to return to the old rule of capture with exemption of neutral property. Contemporaneously Great Britain entered into the treaties of 1793 with Russia,⁴⁵ Spain,⁴⁶ the German Emperor,⁴⁷ and Prussia,⁴⁸ by which neutrals were to be prevented "from giving, on this occasion of common concern to every civilized state, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea or in the ports of France." In conformity with these agreements and with the British desire to control the trade of her enemy, to restrict his imports, and to maintain the carrying trade of her own merchants, the Orders in Council passed during the first war anticipated practically all the measures adopted during the second war with France. England entered the war unhampered by any treaty engagements to observe the principles which had been endorsed by numerous treaties of the previous hundred years. She was upon safe ground, therefore, in condemning enemy goods on neutral ships. She went further, however, extending her contraband list to include corn, flour, and meat, and condemning as good prize all ships which were captured conveying provisions to the French colonies or their products from them. English practice varied between the condemnation of neutral ships and the neutral cargo on board and the exercise of the right of préemption.⁴⁹ Danish commerce was nearly wiped out. The strictures upon American trade led to war talk in the United States, but instead the Jay Treaty contained the very rules which Great Britain had been upholding as the law of nations, the only treaty ever signed by the

⁴⁵ Martens, *Rec.* V, pp. 440-442.

⁴⁶ *Ibid.*, p. 477.

⁴⁷ *Ibid.*, p. 488.

⁴⁸ *Ibid.*, p. 485.

⁴⁹ Fish, C. R., *American Diplomacy* (New York, 1915), pp. 108-114.

United States which agreed to those principles.⁵⁰ The United States did not like the treaty but preferred its terms to war. It placed the United States in a position which France could and did attack as unneutral.

In 1797 Great Britain and Russia signed a treaty of commerce which made no change in the old rules.⁵¹ The treaty of 1801 between these two powers has already been mentioned. Boeck draws attention to a special clause exempting from the fate of enemy goods: "les marchandises du produit du cru ou de la manufacture du pays en guerre, qui auraient été acquisés des sujets de la puissance neutre et seraient transportées pour leur compte."⁵²

The utter disregard for neutral rights which marked the years succeeding the rupture of the Peace of Amiens found expression in British practice as in that of her enemies. The British measures adopted to combat the "Continental System," like that "System" itself were based upon blockade, with which, *per se*, this study is not concerned. Great Britain continued to hold to and act upon the ancient principles of capture at sea until the War of the Crimea.

II. French and Spanish Practice Previous to 1854

Prior to the seventeenth century, with the exception of the Anglo-Spanish treaty of 1351, the evidence of treaties as to French and Spanish observance of rules of maritime law is lacking. The ordinances of France, whose principles were followed in Spain, provide an adequate substitute. By the first of these Ordinances, that of 1533, the rules of the *Consolato*, hitherto observed, were modified to the extent that neutral property was made capturable in enemy vessels. To this was added in 1543 the still harsher rule that the neutral ship, carrier of enemy goods, was good prize. "Ainsi," says Boeck, "le pavillon confisque la cargaison, et la robe de l'ennemi confisque la robe de

⁵⁰ Martens, *Rec.* V, pp. 672-674.

⁵¹ *Ibid.*, VI, p. 362.

⁵² Boeck, p. 77.

l'ami et le navire.'"⁵³ His conclusion on the latter point he bases upon a study of the ordinance of 1584,⁵⁴ which repeats the rules of 1543, differing from Valin and Cleirac, who interpreted the ordinances of 1543 and 1584 to mean that the goods only were confiscated, the neutral ship being released.⁵⁵ He regards the decree of the Parlement in 1592 releasing a Hamburg merchant vessel captured with an enemy cargo aboard as simply an exception. The general rule under the decrees was that of hostile infection—enemy ship, enemy goods; enemy goods, enemy ship.

By the next important ordinance, that of 1650, neutral ships were released from liability for carrying enemy property.⁵⁶ Neutral property in enemy ships also was made immune. Thus the practice of the *Consolato* was revived.

The ordinance of 1681 returned to the principle of hostile infection, which Valin asserts to have been confined to France and Spain and which is by some authors denominated the "French System."⁵⁷ The rigor with which this ordinance was applied is illustrated by an edict of 1705 according to which, if a privateer made a capture which was found to be unjustified, the neutral owner nevertheless should stand the costs of the action.⁵⁸

The conventional agreements of France during the seventeenth century, like those of England, show the influence of the new ideas of neutral rights. By a treaty of 1604 France obtained from Turkey the promise that she would not confiscate goods of her enemies found on French vessels—a unilateral application of the free ships, free goods rule.⁵⁹ In 1650 Spain and the United Provinces agreed to observe reciprocally that

⁵³ Boeck, p. 37. He adds in a note on the same page that according to Cleirac (*Us et coutumes de la mer*, Bordeaux, 1647, p. 406) the word "robe" was applied by merchants of Provence, Catalonia, and Italy to goods of all kinds.

⁵⁴ Clauses in point quoted by Boeck, pp. 37-38.

⁵⁵ Comments quoted by Boeck, p. 39.

⁵⁶ Valin, *Ord. de la marine*, III, 9; Art. I, cited by Manning, p. 323, and note 4.

⁵⁷ *Ibid.*, Art. VII: "Tous navires qui se trouveront chargés d'effets appartenant à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise." Quoted by Boeck, p. 46.

⁵⁸ Boeck, p. 46.

⁵⁹ Dumont, V. 2, p. 40.

rule with its accompanying enemy ships, enemy goods.⁶⁰ In 1646⁶¹ France in a treaty with Holland agreed to a provision to which the Dutch with good reason attached the significance of "free ships, free goods," but which France interpreted simply as conferring immunity upon neutral ships carrying enemy goods, not contraband. In 1655 France incorporated practically identical provisions in a treaty with the Hansa towns, with the additional article that goods of Hansa subjects found aboard enemy ships should be restored to them.⁶² In 1667 Spain and England agreed to permit the flag to cover the cargo.⁶³ Between France and Spain the new rules were agreed to in the Treaties of the Pyrenees of 1659⁶⁴ and of Aix-la-Chapelle of 1668.⁶⁵ Obviously, the seventeenth and eighteenth centuries were the great period of struggle between contending principles, the more liberal enroaching gradually but surely and appearing contemporaneously in the treaties of the same power alongside other treaties containing rules of a more severe character. Even the general agreement upon the new principles in the various treaties of Utrecht⁶⁶ did not antiquate the tendency to make

⁶⁰ *Ibid.*, VI, 1, p. 571.

Article XIII. "A été en outre accordé & convenu, que tout ce qui se trouvera chargé par lesdits Subjects & Habitants des Provinces-Unies en un Navire des Ennemis dudit Seigneur Roy, jaoit ce ne fust Marchandise de Contrebande, sera confisqué avec tout ce qui se trouvera audit Navire sans exception ni reserve."

Article XIV. "Mais d'ailleurs aussi sera libre & affranchi, tout ce qui sera dans les Navires, appartenants aux Subjects desdits Seigneurs Etats, encore que la charge, ou partie d'icelle fût aux Ennemis dudit Seigneur Roy, sauf les Marchandises de Contrebande, au regard desquelles on se reglera selon ce qui a été disposé aux Articles precedents."

⁶¹ Discussed in Manning, pp. 316-317.

⁶² Dumont, VI, 2, p. 103. This treaty, however, Boeck (p. 41) accepts as "formulating in explicit terms les deux principes: Vaisseaux libres, marchandises libres, et, pavillon ennemi ne confisque pas marchandise amie." If he is correct, this treaty incorporates the principles introduced into the Declaration of Paris.

⁶³ Dumont, VII, I, p. 27.

⁶⁴ *Ibid.*, VI, 2, p. 267.

⁶⁵ *Ibid.*, VII, I, p. 90.

⁶⁶ Dumont, *France and England*, VIII, 1, pp. 348-349; *France and Holland*, VIII, 1, pp. 379-380; *Spain and England*, p. 409; *Spain and Holland*, p. 431.

Boeck states in note on p. 49 that the Anglo-Spanish treaties of peace and of commerce do not "speak of the fate of enemy property under neutral flag, nor of that of neutral property under enemy flag." This statement is not in accord with those of other writers. Article I of the "*Treaty of Navigation and Commerce between Great Britain and Spain*", signed at

treaty rules to fit peculiar circumstances, the history of agreements continuing to show anything but uniformity. The majority of the treaties during the eighteenth century, however, as previously noted, incorporate the principle that the flag covers the merchandise. Boeck states that Holland, Sweden, Denmark, France, Prussia, and Spain faithfully observed the principle in their mutual relations; that the French ordinance of 1744 was not enforced against Denmark, Sweden, or Spain; that on this account also Spain respected enemy merchandise on board Dutch and French vessels; and that only because Great Britain was confiscating the goods of Spanish merchants aboard French and Dutch vessels did Spain retaliate with an ordinance of 1741 decreeing confiscation of English cargoes on board the same vessels.⁶⁷

The French ordinance of 1744 stood to that of 1681 as had the ordinance of 1650 to that of 1594, commanding the prize courts to condemn enemy goods but to release the neutral ships which carried them.⁶⁸ In July, 1778, a new ordinance made neutral carriers of contraband confiscable only if the cargo were two-thirds contraband.⁶⁹ In 1780 Spain issued an ordinance to place the French practice on a legal basis in Spain.

The record of fact gives to France and Spain small ground to stand upon in justifying their association with the Armed Neutrality of 1780. It did, however, evidence a gradual advance through several centuries, and the ordinance of 1778 did contain the major principle for which the league of neutrals stood. For France to maintain in 1780 that that principle rather than any other was a part of the law of nations was, it would appear, to admit that her long series of ordinances had all been contrary to international law. Her reason for acquiescing in the principle was selfish; on the other hand, the close con-

Utrecht, December 9, 1713, ratifies and confirms the Treaty with Spain of May 13-23, 1667, inserting it word for word. Articles XXIII and XXVI of that treaty contain the new rules. *British State Papers*, I, p. 615.

⁶⁷ Boeck, pp. 50-51.

⁶⁸ For additional stipulations upon the determination of ownership see Boeck, p. 51. Ordinance printed by Valin, II, p. 253.

⁶⁹ Martens, *Rec.* III, 122. This ordinance is usually regarded as embodying the rule of free ships, free goods. Boeck states the necessary proportion of contraband as three-fourths, p. 59.

tact with neutral grievances could not but demonstrate to one of the greatest belligerents the unmistakable tendency toward greater freedom for commerce in time of war. The conventional agreements of the Treaty of Utrecht were renewed at the Peace of Paris in 1783. Treaties of France with Holland,⁷⁰ Great Britain,⁷¹ Russia,⁷² and Hamburg⁷³ marked the next ten years, evidencing the continuance of the sentiment for enlarged commercial freedom.

Leaving for a later chapter the legislative discussion of 1792, the record of French law and practice takes on in 1793 a tinge analogous to that already noted on the other side of the Channel. In that year the political paths of France and Spain divide, but their practice remains similar. With both of these states the United States had treaties specifying that "free ships" should make "free goods." Spain confirmed the provision in 1795,⁷⁴ France not until 1800.⁷⁵ During the years preceding the treaty of Morfontaine France was forced to adopt a policy of retaliation against the British policy of control of trade. For her to have permitted enemy goods to be free in neutral vessels while Great Britain pursued a general policy of capture would have been too great a sacrifice. Accordingly she passed in 1793 ordinances which had the effect of legalizing the capture of enemy goods in any vessel and the preëmption of provisions in neutral vessels, to whatever person they belonged.⁷⁶ Thus by both sides the neutral carrying trade and neutral agricultural products were placed under the ban. The Jay Treaty was followed by a decree placing all neutrals under liability to the same treatment as Great Britain was able to exercise over them. The proofs required of neutral ownership were made more stringent. Finally, the old French rule of

⁷⁰ Martens, IV, p. 68.

⁷¹ *Ibid.*, pp. 168, 172.

⁷² *Ibid.*, p. 210.

⁷³ *Ibid.*, p. 426.

⁷⁴ Martens, VI, p. 154.

⁷⁵ *Ibid.*, VII, p. 103.

⁷⁶ For a concise account of the practice during these years see Boeck, pp. 69-76.

hostile infection was revived.⁷⁷ And the operation of this rule was made even more oppressive by an arbitrary listing of numerous articles as of English make which were actually the product of other countries.

The interest and inclination of France were, however, in the other direction. She tried in vain at the Peace of Amiens to obtain new regulations for war at sea. Trafalgar had not yet definitely assured British maritime supremacy, but England was able to hold back the progress of neutral rights for another half-century. Her representative at the Congress of Vienna was instructed not to discuss the rules of capture.

France in her treaties of the next forty years maintained always the principle under which the flag covered the cargo.⁷⁸ In 1823, on the occasion of sending an armed expedition into Spain, she gained for herself the honor of being the first great power to respect private enemy property upon enemy ships. In the despatches of Chateaubriand, Minister of Foreign Affairs, sent April 17, 1823, to French foreign representatives, occurs this promise:

"La marine royale ne prendra que les bâtiments de guerre espagnols; elle n'arrêtera les bâtiments marchands espagnols ou étrangers que dans le cas où ils tenteraient de s'introduire dans une place réellement bloquée par les forces navales du Roi et chercheraient ainsi à forcer un blocus effectif."⁷⁹

Opinions are divided as to the merit of this action. France lost but little by renouncing the right of capture and gained greater respect for her enterprise. The intervention against the Spanish revolution was not favored by England and America.

⁷⁷ Guichard, *Code des prises*, II, p. xli, quoted by Boeck, p. 73. "L'état des navires, en ce qui concerne leur qualité de neutre ou d'ennemi, sera déterminé par leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre ou de ses possessions, sera déclaré de bonne prise, quel que soit le propriétaire de ces denrées ou marchandises."

⁷⁸ Boeck states, p. 101, that the treaty of 1842 between Great Britain and Portugal was the only treaty of the nineteenth century which denied the inviolability of the neutral flag. The 11th clause of the treaty contains the rules of the *Consolato*. State Papers XXX, p. 378. Boeck's statement, however, overlooks the British convention of 1801 with Russia.

⁷⁹ Boeck, p. 96.

III. THE PRACTICE OF HOLLAND PREVIOUS TO 1854

The Netherlands, in common with general European usage, took as the basis of maritime law the *Consolato del Mare*. The principles of that compilation found expression in a treaty with Scotland in 1594.⁸⁰ In her struggle with Spain, these rules in so far as they protected neutral ships carrying goods of any sort to the enemy, had been set aside and absolute prohibition of such trading had been enjoined, the penalty being set at the confiscation of ship and cargo.⁸¹ The Low Countries in their necessity legalized operations which went beyond the French rule of hostile infection and might have been taken as a pattern by the belligerents in the wars following the French Revolution. A comparison of the practice in this war with the Dutch efforts of the next century affords the best possible illustration of how self-interest overcomes principle, a truth that forms the background for every movement either forward or backward in the history of the immunity of private property from capture at sea.

It was fortunate for the cause of progress that during the seventeenth century Holland was the common carrier for Europe. Dependent upon the freight derived from this extensive transport system, Holland's shipowners influenced their government to sponsor the twin maxims: free ships, free goods; enemy ships, enemy goods. The latter concession to belligerents was the price paid for the former obtained by neutrals.

This wedge introduced by the Netherlands into the old system was driven home by the continual efforts of the Grand Pensionary De Witt and his successors. Dutch disappointment at the French interpretation of the treaty of 1646 has already been noted. Four years later Spain agreed to a treaty with the United Provinces, the first to contain the new rules.⁸² With Great Britain they were less fortunate, the treaty of 1654 maintaining the so-called English rules,⁸³ although in the same year

⁸⁰ Quoted from Ward by Boeck, p. 35.

⁸¹ Boeck reproduces the Dutch Placards of July 27, 1584; April 15, 1586; and of August 4, 1586 from Lamberty: *Mémoires pour servir à l'histoire du XVIIIe siècle* (The Hague, 1731); see Boeck, pp. 35-36.

⁸² Dumont, VI, 1, p. 571.

⁸³ *Ibid.*, VIII, p. 74.

Great Britain granted to Portugal the privilege so ardently desired by the Dutch.⁸⁴ France yielded to importunity in 1661,⁸⁵ Great Britain not until 1667,⁸⁶ at the end of a war in which London for the first and last time had heard the guns of a hostile fleet, and when it was essential to gain the support of Holland against Louis XIV in the Spanish Netherlands.

Holland was able to attain the renewal of her principles with England in 1674⁸⁷ and in 1689,⁸⁸ but was unsuccessful in 1784.⁸⁹ On the other hand, all Dutch treaties with France after 1661 and up to 1854 contained the new regulations.

While Holland was urgent in her petitions for conventions so well suited to her interests, her practice when at war exhibited the opposite viewpoint. In the first part of the seventeenth century she warred with Spain; in the second part with France. In 1630 an edict was issued declaring a paper blockade of the ports of Flanders and every ship met on the high seas bound for those ports good prize.⁹⁰ In 1689 she bound herself with Great Britain to prevent all neutral nations from trading with France.⁹¹ This violation of treaties aroused Sweden and Denmark to form an armed neutrality which had influence enough to bring the belligerents to respect their treaty engagements.⁹²

Throughout the eighteenth century Holland maintained a consistent support of her principles. She acceded to the Armed Neutrality, too late to escape the consequences of her friendship for the American cause.⁹³ Following the war Holland's treaty with the United States contained the maxims favorable to neutrals.⁹⁴ By this date the importance of Holland's position on maritime regulation had fallen with her loss of rank as a great power.

⁸⁴ *Ibid.*, VI, 2, p. 81.

⁸⁵ *Ibid.*, p. 346.

⁸⁶ *Ibid.*, VII, 1, p. 49.

⁸⁷ Dumont, VII, 1, p. 119.

⁸⁸ *Ibid.*, VII, 2, p. 236.

⁸⁹ Martens, *Rec.* III, p. 560.

⁹⁰ Wheaton, H., *Histoire des progrès du droit des gens*, 4th ed. (Paris, 1865), I, pp. 183-185.

⁹¹ Dumont, VII, 2, p. 238; Hautefeuille, *Droits et devoirs des neutres* (Paris, 1868), 2, p. 29.

⁹² *Ibid.*, p. 325; see Boeck, p. 42.

⁹³ Martens, *Rec.* III, pp. 215-222.

⁹⁴ *Ibid.*, p. 439.

IV. THE PRACTICE OF OTHER EUROPEAN STATES PREVIOUS TO 1854

The great systems of the law of capture at sea and their sources have been outlined. Certain states which today rank as great powers have been only incidentally mentioned, together with others which have never risen to first rank, or have fallen from that position. For the sake of completeness it should be noted that Sweden, Denmark, and Portugal, while following with Europe generally the customs of the *Consolato* previous to the rise of the Dutch principles, after the middle seventeenth century followed the lead of Holland in seeking treaties which should protect them as neutrals. Where the prejudices of stronger states imposed less desirable terms we find treaties, such as that of 1661 between England and Denmark, which contain the rules of the *Consolato*.⁹⁵ And as belligerents these nations reproduced the situation demanded by self-interest. In 1659 Denmark proclaimed all merchandise consigned to Swedish ports confiscable.⁹⁶ In 1715 Sweden enforced against Russia an ordinance for the condemnation of enemy goods on neutral ships, neutral goods on enemy ships, and neutral goods on neutral ships, if the ship carried any contraband goods whatever.⁹⁷

Denmark and Sweden were members of the three armed neutralities, all of which have been sufficiently touched upon. In the latter two of these important leagues of neutrals they were associated with Russia and Prussia, both powers which attained recognized standing in Europe in the eighteenth century. Previous to 1780 Russia's practice as indicated by her treaties depended upon the state with which the treaty was made. In 1715 Russia and the United Provinces agreed to let free ships make free goods.⁹⁸ In the same year Peter the Great carried on the war with Charles XII of Sweden without restricting neutral commerce. In 1734 Russia's treaty with Great Britain went no further than the *Consolato*.

⁹⁵ Dumont, VI, 2, p. 346.

⁹⁶ Boeck, pp. 43-44.

⁹⁷ *Ibid.*, p. 50.

⁹⁸ Dumont, VIII, I, p. 431.

For the usage of Prussia prior to the Armed Neutrality of 1780 we have the arguments *tels quels sont* of the Prussian commissioners in the Silesian Loan Controversy which will be better left to a later chapter. In 1762 a treaty with Sweden provided for the observance of the "twin maxims."¹⁰⁰ For both Russia and Prussia the ratification of the treaties by which they bound themselves to observe the principles of the Russian manifesto of 1780 was their first great contribution to the development of a just law of capture at sea.

The famous manifesto of Catherine II was a protest against British conduct in maritime warfare. It was dated February 28, 1780, and was incorporated with some amplification in treaties between Russia and Denmark,¹⁰¹ Sweden,¹⁰² Holland,¹⁰³ Prussia,¹⁰⁴ the Emperor,¹⁰⁵ Portugal,¹⁰⁶ and the Two Sicilies.¹⁰⁷ France and Spain were not at the time in a position to become members of an association of neutrals, but they expressed their adherence to its doctrines.¹⁰⁸

The second article of the manifesto, the only one which concerns this essay,¹⁰⁹ marks an advance over the Dutch rules in that it asserts that free ships shall make free goods and omits the rule that enemy ships make enemy goods, which from long association had come to be regarded as the logical corollary of the former maxim. On the other hand, the freedom of neutral goods in enemy ships is not stipulated, indicating either an unwillingness to demand too much or a tacit recognition that the rule of the *Consolato* being already the common law of the sea did not need proclamation.

The importance of the Armed Neutrality of 1780 lies not only in the unanimity of Europe in its acceptance of the Russian proposal but in the fact that the countries who either acceded or

¹⁰⁰ Martens, *Rec.* 1, p. 39.

¹⁰¹ *Ibid.*, III, pp. 189-195.

¹⁰² *Ibid.*, p. 198.

¹⁰³ *Ibid.*, p. 215.

¹⁰⁴ *Ibid.*, p. 245.

¹⁰⁵ *Ibid.*, p. 252.

¹⁰⁶ *Ibid.*, p. 263.

¹⁰⁷ *Ibid.*, p. 267.

¹⁰⁸ *Ibid.*, p. 162, 164.

¹⁰⁹ Quoted ante p. 13, note 2.

adhered bound themselves not only to Russia but to each other.¹¹⁰ The great society of neutral nations marked the first crystallization of a new law of maritime capture; forces which they could not then control reproduced the solution of the preceding century; but the crystals appeared again in 1800 and a half century later the elements tending to oppose permanent precipitation had lost effective strength.¹¹¹

¹¹⁰ Martens, *Armateurs* (Göttingen, 1795) pp. 158-159: "Ces conventions ont donc presque la force d'un traité général entre les divers membres de l'association sans en avoir la forme." Quoted by Boeck, p. 56.

¹¹¹ The later practice of the states dealt with in the last section has been indicated in the earlier part of the discussion with the exception of the treaty of 1785 between Prussia and the United States which is left to the chapter on American practice.

CHAPTER II

THE DECLARATION OF PARIS AND SUBSEQUENT
EUROPEAN PRACTICE

"Allein, sowohl der Wiener Kongress wie jener zu Paris (1856) liessen die Frage der Freiheit des Privateigentums unberührt; man beschränkte sich auf Zugeständnisse im Interesse des Handels der Neutralen, womit allerdings mittelbar ein teilweiser Schutz des feindlichen Privateigentums erzielt worden ist, indem die Seerechtsdekларation den Grundsatz 'frei Schiff, frei Gut' sanktionierte."

The Declaration of Paris is significant in the history of the development toward immunity of private property from capture at sea. By her adhesion to it Great Britain finally gave her sanction to the principle of the freedom of enemy property under the neutral flag, a principle already established in the jurisprudence of France and accepted in theory by the United States. At the same time that part of the English rule which had been sacrificed in order to establish the inviolability of the neutral flag was revived and placed alongside the latter rule.² The compromise of free ships, free goods; enemy ships, enemy goods, was replaced by rules which incorporated the advantageous principles of both the *Consolato del Mare* and the Dutch system while excluding those features of each which international relations had outgrown. In principle the right to capture the private property of enemies remained in force; it was modified by the second article of the Declaration of Paris in accordance with the purpose to rid the trade of neutrals of restrictions not necessitated by regard for belligerent interests.

The British and French governments prepared the way for

¹ Ullman, E., *Völkerrecht* (Tübingen, 1908), sec. 188, p. 511.

² "Le pavillon neutre couvre la marchandise ennemie à l'exception de la contrebande de guerre."

3. "La marchandise neutre, à l'exception de la contrebande de guerre n'est pas saisissable sous pavillon ennemie."

Martens, *Nouveau recueil général de traités*, XV, p. 792.

the Declaration of Paris by putting into practice in the Crimean War the principles adopted by the powers concerned at the end of that war. Considerations of convenience and interest were motives for the liberality which characterized the maritime warfare of 1854-56. France and Great Britain carried on their naval operations jointly. To have attempted to practice two opposing systems of maritime capture would have resulted in confusion and might have endangered the alliance.³ France proposed the revival of the old system of commercial warfare by which all direct and indirect relations with the enemy were forbidden. The Committee of the Privy Council which included Dr. Lushington and Lord Kingsdown advised against such restrictions because former wars had shown that they resulted in equal injury to both sides.⁴ The alternative, the combination of the British and French systems by the exclusion of the contradictory elements of each, was adopted.

The two governments were also concerned with the reconciliation of their interests with those of neutrals. They

"waived the ancient belligerent rights because they knew that the exercise of such rights though based on the tradition of the laws of nations, would cost infinitely more than it was worth and would probably have secured to Russia important allies instead of leaving her isolated against the Western Powers."⁵

The agreement was to conclude with the end of the war and was not a compromise.⁶ Neither France nor Great Britain received reciprocal advantages nor made any sacrifice which operated to the individual interest of either. Greater unity of action was to their mutual benefit and that they brought about. The direct beneficiaries were neutral nations and the opposing belligerent.⁷ The new rules were carried out with the limita-

³ See speech of Lord John Russell in the House of Commons, July 14, 1857, *Hansard*, third series, CXLVI, p. 1490.

⁴ Ed., "The Declaration of Paris," in *Edinburgh Review*, 144, Oct., 1876, p. 189.

⁵ *Ibid.*, p. 188.

⁶ Johnstone, *Maritime Rights*, Ch. 9, p. 87. Quoted by Boeck, p. 106, note 2. For negotiations leading up to this agreement see Kleen, R., *Lois et usages de la neutralité* (Paris, 1898), I, pp. 42-44.

⁷ For the identic declarations of March 28 and 29, 1854, see Ortolan, T., *Diplomatie de la mer*, 3rd ed., (Paris, 1856); App. Special, pp. 468-469; also Niemeyer, *Urkundenbuch zum Seekriegsrecht* (Berlin, 1913), Abl. I, pp. 65, 67.

tions imposed by harsh application of the prohibitions against sale *in transitu*, extended contraband lists, and the use of the principle of continuous voyage against contraband.⁸

The Crimean War was the first in which a period of grace was allowed to enemy merchant vessels in port at the opening of war to complete their lading and to proceed in safety to their home ports. Turkey made this rule the last article of her Declaration of War of October 4, 1853.⁹ In the Declaration of March 27, and in the Instructions of March 31, 1854, France granted a period of grace of six weeks to Russian merchant vessels. On March 29 Great Britain provided for similar action.¹⁰ Ships on the high seas captured by French or British cruisers and provided with the proper passports were to be released provided they were going directly to their port of destination as established by their papers.¹¹

During the war Russia and the Two Sicilies entered into conventions with the United States, the former signed July 22, 1854, the latter January 13, 1855, which contained identical articles stipulating for the freedom of the neutral flag and of neutral property in enemy vessels.¹² The other governments of Europe and America to which Secretary of State Marcy directed proposals for similar conventions deferred action until the end of the war.¹³

On April 8, 1856, Count Walewski, the first representative of France, asked the plenipotentiaries of Austria, Great Britain, Prussia, Russia, Sardinia, and Turkey to agree with his country to signalize the Congress of Paris by putting an end to some of the disputes which had long hindered the development of a uniform law of maritime warfare. The four principles that he proposed were accepted by the Powers represented on April 16,

⁸ For the treatment of practice during the Crimean War see Boeck, pp. 108-113. For case of continuous voyage see Oppenheim, *International Law* 2nd ed., (London, 1912), II, p. 501.

⁹ Scott, J. B., "Status of Enemy Merchant Ships" in *A. J. I. L.*, II, 1908, pp. 259-270.

¹⁰ Boeck, p. 108.

¹¹ Ortolan, pp. 466-467; 470-471.

¹² Martens, *N. R. G.*, XVI, I, pp. 570, 572.

¹³ Annual Message of President Pierce, December 2, 1856, Richardson, J. D., *Messages* (Washington, 1897), V, p. 412.

1856, and they constitute the Declaration of Paris, which by virtue of the ratification of all the civilized powers excepting the United States has become the most notable international document of modern times, expressive of rules of international law grounded firmly in the consent of nations.¹⁴

‘Jamais, ni au Congrès de Westphalie, ni à celui de Vienne rappelés par le Comte Walewski, il n’y eut une belle unanimité parmi les puissances; et jamais encore des principes plus nets et plus fermes, reconnus d’une façon aussi solennelle, n’avaient été proclamés dans les droits de la guerre, jamais progrès plus complet n’y avait été réalisé.’¹⁵

Spain and Mexico based their refusal to adhere to the Declaration upon the relative weakness of their navies and the necessity of a possible recourse to privateering. Both of these states were willing to assent to all but the first rule, but the terms of the Declaration provided that acceptance or rejection must be *in toto*. The attitude of the United States involved practical and theoretical considerations which will be taken up in other chapters.

The unanimity manifested at the Congress of Paris was not belied by the practice of the nations in the wars which followed. Within fifteen years seven wars, four European, two American, and one Oriental, had been fought. In each of the six with which this chapter is concerned, not only were the rules of the Declaration observed, but there was made some advance beyond them.

By the third article of the treaty of Zurich (November 10, 1859) it was stipulated that the French Government should restore those Austrian vessels which had been captured but not adjudged confiscate prior to the cessation of hostilities.¹⁶ On March 29, 1865, a decree of France ordered similar disposal of Mexican vessels captured but not condemned.¹⁷ Except for the

¹⁴ Holland, T. E., *Letters on War and Neutrality* (London, 1909), p. 123, notes the adherence of Spain and Mexico in 1908 and 1909 respectively.

¹⁵ Funk-Brentano, Th., “La déclaration de Paris de 1856 et son application dans les temps modernes” in *Revue générale de droit international public*, I, 1891, p. 326. For concise statement of the negotiations regarding the Declaration see Niemeyer, pp. 53-64.

¹⁶ Martens, N. R. G. XVI, 2, p. 517.

¹⁷ Cauchy, E., *Du respect de la propriété privée dans la guerre maritime* (Paris, 1866), pp. 120-121. Quoted by Boeck, p. 128.

confiscation of a portion of the captured Mexican merchantmen, this treatment was analogous to sequestration.

During the Anglo-Chinese War of 1858-1860 in which France participated, Great Britain permitted, and France did not prohibit, enemy trading with China. Chinese vessels and cargoes trading to the ports of either of her enemies were free from capture. This limitation of capture was justified by the advantages it secured in the control of Chinese trade, since the ships and goods of China proceeding to other than French and English possessions were confiscable.¹⁸ The action of the two governments appears to have been based upon narrow grounds of selfish interest, and to have amounted in fact to an attempt to capture all Chinese trade, depriving individual proprietors of their freedom to choose their markets, while suffering them to escape direct loss of property.

The right of prize was exercised by Denmark, Prussia, and Austria in the war over Schleswig-Holstein. The treaty of peace, however, annulled its effects by providing (October 30, 1864, Art. 13), that all merchant ships captured by either side should be returned, or their ascertained value or diminution of value be paid.¹⁹ "Ainsi le traité de paix . . . reconnut implicitement la règle que, même dans les guerres maritimes la propriété privée doit être respectée."²⁰ The fact that this settlement was entirely to the advantage of the victorious nation deprives it of significance except as it may be considered to indicate that the interest of the merchant is an interest of large importance to belligerent nations, one to be protected wherever possible.

Articles 211 and 212 of the Italian merchant marine code abolish the capture of mercantile vessels of an enemy state on condition of reciprocity, exempting contraband from this moderation.²¹ Article 215 decrees the confiscation of the neutral ship

¹⁸ Hautefeuille, L. B., *Questions de droit maritime international* (Paris, 1868), p. 106, n. 1.

¹⁹ Martens, N. R. G., XVII, 2, pp. 478-480.

²⁰ Bluntschli, J. C., "Du droit de butin" (Abridged translation of *Das Beute-recht im Krieg und das Seebeuterecht insbesondere*) in *Revue de droit international*, IX, 1877, p. 554.

²¹ Art. 211. "La cattura e la preda di navi mercantili di nazione nemica per parte delle navi da guerra dello Stato saranno abolite in via di recip-

whose cargo is composed wholly or partly of contraband. Article 243 provides that the merchant ships of the enemy state in port or territorial waters on the outbreak of war shall be free to depart when they will unless the government sets a definite period for their departure, or determines to act otherwise by way of reprisal. Article 244 allows for optional condemnation or sequestration.

When war broke out in 1866, Italy had only to put into operation these provisions of her maritime law. Austria and Prussia on the 13th and 19th of May respectively had decreed immunity to enemy ships and their cargoes on condition of reciprocity and excepting ships carrying contraband or breaking blockade.²² Although none of the belligerents were important maritime powers, they were all states of the first rank.

The value of the precedent set in 1866 finds recognition in the ordinance of the king of Prussia, July 18, 1870. Without mention of reciprocity, the capture of innocent enemy merchant ships and cargoes was forbidden.²³ France with a navy powerful enough to blockade her enemy's ports followed the rules of 1856, granting, however, a thirty days' delay in which enemy ships in

rocita verso quelle potenze, che adotteranno eguale trattamento a favore della marina mercantile nazionale. Il trattamento di reciprocità dovrà risultare da leggi locali, da convenzioni diplomatiche, o da dichiarazioni fatte dal nemico prima del Cominciamento delle ostilità."

Art. 212. "Sono escluse dal disposto dell' articolo precedente la cattura e la confisca per contrabbando di guerra, nel qual caso la nave in contravvenzione sarà assoggetata al trattamento delle navi neutrali che infrangono la neutralità. Sono pure escluse dal disposto di cui sopra, la cattura o confisca per rottura di blocco effettivo e dichiarato." Quoted by Niemeyer, pp. 150-151. Law of 1865 incorporated in Code of 1871.

²² Austrian Decree:

Art. I. "Les navires marchands et leurs cargaisons quoiqu' appartenant à un État ennemi, de l'Autriche, ne peuvent être capturés en mer ni déclarés de bonne prise, quand l'État ennemi agit de même envers les vaisseaux marchands autrichiens."

Art. II. "L'article premier n'est pas applicable aux navires marchands qui portent de la contrebande de guerre ou qui rompent un blocus légalement obligatoire."

Prussian Decree:

"Sur la proposition du ministre d'état, il est ordonné qu'en cas de guerre, les navires marchands de l'État ennemi ne seront pas capturés par nos navires de guerre, à condition de reciprocité. Toutefois cette disposition ne sera pas applicable aux navires qui seraient sujets à capture s'ils étaient neutres." *R. D. I. VII*, 1875, p. 573, n. 2.

²³ Martens, *N. R. G.*, XIX, p. 588.

port when war began or having subsequently entered in ignorance of the state of war might leave with safe conducts.²⁴ On January 19, 1871, Prussia revoked the ordinance of July but had condemned no enemy vessels before peace was declared.²⁵ The small number of captures made by France, some 75 vessels valued at 6,000,000 francs, affords no measure of the indirect loss inflicted by France through her retention of the right of prize. The Treaty of Frankfort stipulated that the merchant vessels and cargoes, not condemned before March 2, 1871, should be restored or if this were impossible, their value, ascertained on sale, should be returned to their owners. As at the peace between Prussia and Denmark, the balance of advantage from this arrangement lay too heavily with the victors to give it great importance as an indication of regard for the rights of private owners.

We have not examined the practice of the destruction of enemy prizes at sea for the period previous to 1856 because until that date the support of international opinion for the rule of respect for neutral property in enemy bottoms had constantly wavered. Since that date the question of destruction has had a direct bearing upon the effectiveness of the third rule of the Declaration of Paris and may indicate the futility of the attempt to exempt enemy property.²⁶ The United States Government in 1812, in the desire to use every cruiser to its fullest effectiveness, instructed its naval officers to destroy enemy ships without scruple.²⁷ The Confederate application of the same theory during the American Civil War is notorious. The legality of the practice is unquestioned. But the British prize courts have established the rule of compensation where neutral property is destroyed in consequence.²⁸ The existence of this rule

²⁴ Scott, J. B., *A. J. I. L.*, II, 1908, p. 263. This decree explained by circular of August 13, 1870, *N. R. G.*, XIX, pp. 588-590.

²⁵ *N. R. G.*, XIX, p. 590.

²⁶ Bentwich says: "The Declaration of Paris which exempted neutral goods under an enemy flag from capture has been followed by the practice of prize destroying; necessities of war would probably follow in the wake of legal exemption of enemy vessels". *War and Private Property* (London, 1907), p. 95.

²⁷ Bentwich, p. 95.

²⁸ *The Felicity*, 2 Dods., 383; *The Leucade*, Spinks, 221.

was denied by the decision of the French prize court in 1872 which refused compensation to neutral owners of non-contraband goods on board the German ships *Ludwig* and *Vorwaerts* burned at sea by the *Dessair*. The court held that while

"under the terms of the Declaration of Paris neutral goods on board an enemy's ship cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale of payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;"

in this case

"the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity."²⁹

Oppenheim dismisses the decision with the statement that "it seems to be obvious that, if the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no indemnities need be paid."³⁰ Hall goes further, his view being that

"the case shows the danger of a belligerent pushing his undoubted right too far and depriving the neutral of the right given him by the Declaration of Paris of using enemy vessels as a means of transport: . . . It ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege that he has acted under the pressure of a real military necessity."³¹

On May 26, 1877, Russia, at war with Turkey, issued an imperial ukase recognizing, *inter alia*, the necessity for the observance of the rules of the Declaration of Paris. By another article of the same document Turkish mercantile vessels in Rus-

²⁹ Calvo, C., *Le droit international* (Paris, 1896), sec. 3033.

³⁰ *International Law*, II, p. 244

³¹ Hall, W. E., *International Law*, 6th ed. (Oxford, 1909), p. 720.

sian ports and harbors were given the time necessary to permit their loading with non-contraband goods and were then permitted to depart.³² Turkey failed to follow her own precedents with a similar decree.

The war of 1884-85 between France and China did not raise the question of capture of non-contraband enemy goods, since France allowed trade to continue except to blockaded ports. In view, however, of developments in later wars, it is worth noting that Great Britain made a strenuous resistance to the French declaration of rice as contraband. Earl Granville, on February 22, 1885, said that the British Government could not admit that provisions in general should be considered as contraband of war, that this could not be admitted even if the destination were a port of naval equipment and that

"in the view of Her Majesty's Government, the test appears to be whether there are circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind are intended for the ordinary use of life and to show, *prima facie* at all events, that they are destined for military use."³³

Both governments maintained their original positions.

The war of 1894-95 between Japan and China found Japan an adherent of the Declaration of Paris,³⁴ China, if not, as Professor Ariga says, "from the viewpoint of the laws of war comparable to the Turks, the Arabs, or the Redskins,"³⁵ had not advanced to the position attained by Japan. Neutrals were concerned with the attitude Japan would take toward applying the Declaration of Paris. The general opinion was that Japan was bound to carry out the rules of that Declaration toward neutrals and that China was not bound; that the Chinese navy might therefore seize enemy property under neutral flags, while the Japanese might not do so. It was argued, however, that this opinion could be attacked on the ground that inasmuch as Japan

³² Martens, *N. R. G.*, second series, 2, p. 216.

³³ *Br. and For. State Papers*, LXXVI, p. 435 ff. On March 11, 1885, the French foreign office in a note to Earl Granville declared that "The importance of rice in the provisioning of the people and army of China made it necessary for the French government to forbid its transport into north China."

³⁴ Ariga, Nagao, *La guerre sino-japonaise* (Paris, 1896), p. 3.

³⁵ *Ibid.*, p. 9.

was bound toward neutrals but not toward China and as China's interest in having her goods transported was at least as great as were the interests of neutrals in transporting them, it would be more just to permit Japan to seize enemy property on condition that she respected the neutral ship from which it was taken. Otherwise, Japan's willingness to advance with western nations would result to her disadvantage.³⁶ It is difficult, however, to see how such an interpretation of the rule leaves it any force at all. It would seem preferable to take the viewpoint adopted by Professor Ariga based on the work of Twiss which he quotes.³⁷ Twiss regarded the Declaration of Paris as binding only between those states which had signed and ratified it, the common law privileges forbidden by it remaining to the signatory states with regard to nations which had not adhered. In effect the question had small importance since Japan voluntarily placed the rules of the Declaration in force and since the maritime operations were insignificant in comparison with those on land, the Japanese being desirous of hampering neutral commerce to the least possible degree. China reciprocated by conforming her conduct to that of Japan and respecting fully the rule that the flag covers the cargo.³⁸

The South African War, carried on by Great Britain with states which possessed no fleet and no seacoast, nevertheless served to point out the changed nature of the questions which have developed with changed law and altered circumstances. With the subjects of blockade and contraband this study is not concerned, except as they react in practice upon the general immunity of private property. An incident which is but one of several of like character in this war involving neutral merchants of the United States, France, Holland, and Germany, illustrated how the application of the principles of visit and search and the

³⁶ "Chronique des faits internationaux" in *R. G. D. I. P.*, I, 1894, pp. 469-470. In chapter III of the present discussion is quoted the American opinion in 1859 relative to the obligations of the signatory powers of the Declaration of Paris toward non-signatory neutrals, that opinion contemplating, however, that all belligerents concerned had adhered to the Declaration.

³⁷ Ariga, p. 7. Twiss, however, appears to have only the first rule of the Declaration in mind.

³⁸ Lawrence, T. J., *Principles of International Law*, 5th ed., (London, 1913), p. 667.

doctrine of continuous transport could combine to hamper seriously innocent neutral trade and to arouse keen resentment in neutral countries.³⁹

The Transvaal Government was known to be receiving supplies of contraband articles through the Portuguese port of Lorenzo Marques on Delagoa Bay. On suspicion that they were carrying munitions and soldiers, the British squadron in African waters seized in December, 1899, and January, 1900, three German merchantmen, the *Herzog*, the *General*, and the *Bundesrath*, all belonging to the German East Africa company. As the suspicions were found to be without basis, the vessels were released without trial, but not before the German Government had entered a vigorous protest which later had the effect of obtaining compensation for the losses due to detention.

The British Government had thus, at a comparatively early date, found its acquiescence in the principles enunciated by the American prize courts as a foundation for the doctrine of continuous voyage to be justifiable. The incident shows as did the practice in the American Civil War that belligerents, deprived by law of one weapon, will seek another. The abrogation of the right to capture enemy goods in neutral vessels meant that such goods would seek neutral transports. Stopped by belligerent vessels or prevented by intervening territory from reaching an inland state directly, neutral vessels would go to the nearest neutral ports. To prevent the enemy from obtaining contraband, the belligerent repudiated the requirement of a hostile destination and seized neutral vessels en route to neutral ports.

³⁹ The application of continuous voyage in the modern sense, dates from the American Civil War. But see article by Woolsey, L. H., "Early Cases on the Doctrine of Continuous Voyage" in *A. J. I. L.* IV, 1910, pp. 823-847. For a treatment of the cases and opinion in the South African War see the "Chronique" in *R. G. D. I. P.*, 7, 1900, pp. 804-827. On p. 807, the writer of the "Chronique" says: "Cette application nouvelle de la théorie du voyage continu était inévitable si l'Angleterre voulait réprimer les expéditions de contrebande de guerre au Transvaal et dans la République d'Orange qui ne sont pas des États maritimes. En fait, les croiseurs de la Grande-Bretagne ont agi à l'égard des navires neutres se dirigeant vers les ports de la colonie portugaise de Mozambique absolument comme s'ils allaient à des ports situés en pays ennemi . . .". See also Baty, T., *International Law in South Africa* (London, 1900), Ch. 1, and Campbell, R. G., *Neutral Rights and Obligations in the Anglo-Boer War*, (J. H. U. Studies, Baltimore, 1908); 26, pp. 230-264.

Hall's words with respect to American practice apply as well to British practice in the South African War except that in the latter cases guilt was not established, and hence the suspected vessels were released:

"Vessels were captured while on their way from one neutral port to another, and were then condemned as carriers of contraband or for intent to break the blockade. They were condemned not for an act,—for the act was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole,—but on mere suspicion of intention to do an act."⁴⁰

In the case of the three German vessels, while the principle of continuous transport led to their being visited, it was the changed circumstances of ocean transport that necessitated conducting them into Durban for search. The right of visit and search, of itself no serious hardship to neutral commerce, when exercised upon great steamships carrying thousands of tons of the products of many different countries, necessitating their being carried into port to be there detained for an indefinite period, contains within itself an almost unlimited potentiality of injury to entirely innocent commerce. This is true where the belligerent acts *bona fide*; there are further possibilities when he deliberately makes use of visit and search to compensate himself for rights relinquished in 1856. International law now forbids the capture of innocent enemy property in neutral vessels; it does not forbid, except by inference, the bringing into port of enemy cargoes upon flimsy suspicions and the detention of such cargoes at the captor's will.

The Russo-Japanese war evoked problems in maritime law which clearly illustrate the necessity for taking account of the influence of developments in law and fact upon the actions of belligerents and upon their attitude toward neutral rights. Russia, in her Imperial Order of February 28, 1904, commanded that the second and third rules of the Declaration of 1856 be observed.⁴¹ Japan did not publish similar orders but she acted in conformity with the rules. Was the conduct of the war such as to demonstrate the effectiveness of the rules and to encourage

⁴⁰ Hall, p. 668.

⁴¹ *Parliamentary Papers*, 1905, 103, Cd. 2348, p. 4.

hope for further advance, or did the belligerents accomplish prohibited results by the extension and expansion of admitted rights?

The liberal allowance of the American Government in 1898 relative to days of grace was not taken as an example by either power. Japan granted a week, February 9-16, 1904, to Russian vessels in her ports or leaving other ports for Japanese ports up to the latter date and returning to Russian ports by an assigned route.⁴² Russia granted but forty-eight hours from the time of publication of the ukase by the local authorities of each port, and included in the exemption only Japanese vessels in Russian ports.⁴³ Lawrence finds reason for the small concession of Russia in the relative importance of Japanese over Russian commerce in the north Pacific.⁴⁴ The Japanese decree was very strictly interpreted. Deep-sea fishing vessels were regarded as outside its operation.⁴⁵

Both governments made full use of the right of capture. Russia, alone, operating at a distance from her home ports, sank many of her prizes, enemy and neutral. Out of a total of 16 Japanese and 15 foreign steamships visited or attacked by the Russians, 9 Japanese and 6 foreign steamships were sunk.⁴⁶ While there appear to have been no important claims by neutral owners of cargo on the destroyed enemy ships, the simple fact that the Russian naval officers did not bring a single enemy steamship into port for trial demonstrates a readiness to act upon an *a priori* assumption of necessity rather than to treat each encounter according to circumstances in order to insure the maximum of protection to both enemy and neutral private property.⁴⁷

The treatment of neutral commerce by the belligerents became important with the rapid disappearance of the Russian

⁴² *Foreign Relations of the United States*, 1904, pp. 414-415.

⁴³ *Parliamentary Papers*, 1905, 103, Cd. 2348, p. 4.

⁴⁴ Lawrence, T. J., *War and Neutrality in the Far East* (London, 1904), p. 53. He draws from the situation the probability of similar action against England at war with a maritime power.

⁴⁵ Hurst, C. J., and Bray, F. E., *Russian and Japanese Prize Cases* (London, 1912-1913), II, pp. xx-xxi, pp. 80-99.

⁴⁶ Takahashi, S., *International Law Applied to the Russo-Japanese War* (New York, 1908), pp. 275-276.

⁴⁷ *Prize Cases*, I, pp. vi-xi.

navy from belligerent waters, and the passing of contraband trade largely into neutral hands. Neither Russia nor Japan discriminated between neutral and enemy vessels in respect to the contingencies in which destruction was permissible.⁴⁸ This failure to discriminate meant that neutral vessels suffered, not that enemy vessels received merciful treatment.

The cases that arose during the war have been treated extensively by learned publicists and need only be outlined here.⁴⁹ They are of interest if from them can be drawn reasonable deductions as to their effect upon the question of immunity.

On July 16, 1904, the *Hipsang*, a British steamer sailing between two Chinese ports with a cargo of beans and beanecake, was torpedoed by a Russian destroyer. The Russian Prize Court found that the *Hipsang* had endeavored to escape and that the action of the destroyer had been correct.⁵⁰ A British naval court of inquiry found, however, that the captain of the *Hipsang* had stopped when ordered to stop, and that she carried no contraband goods, and no Japanese persons; that therefore her destruction was unjustifiable.⁵¹ The two decisions were based on directly opposing statements of fact, the evidence of the former statement justifying the Russian decree.⁵²

On July 23 and 24, 1904, the Vladivostok squadron sank two neutral steamers, the *Knight Commander*, British, sailing from New York to Yokohama and Kobe, with a cargo of railway material and flour; and the *Thea*, German, chartered by a Japanese firm for the coasting trade, with a cargo of fish products not suitable for food. In the first case, lack of enough coal to take the ship to a Russian port was alleged as the ground for sinking, while the carriage of a cargo more than half contraband was made the justification for condemnation. Compensation

⁴⁸ "Prize Regulations, Japan, Mch. 7, 1904", in *Prize Cases*, I, p. 438; Russia, *Ibid.*, II, pp. 315-316.

⁴⁹ Takahashi, *International Law Applied to the Russo-Japanese War*; Hershey, A. S., *International Law and Diplomacy of the Russo-Japanese War* (New York, 1906); Lawrence, *War and Neutrality in the Far East*; Hurst and Bray, *Russian and Japanese Prize Cases*; Sibley, N. W., *International Law as Interpreted during the Russo-Japanese War*, (Boston, 1905).

⁵⁰ *Prize Cases*, Russia, II, pp. xxi-xli.

⁵¹ *Times*, London (weekly edition), August 26, 1904.

⁵² Lawrence, *War and Neutrality*, p. 260.

was granted for the non-contraband goods destroyed in consequence of the sinking of the *Knight Commander*. The court held that the question of the regularity of the sinking of a captured ship was a matter only for the superior of the officer who gave the order for the sinking and not for the prize court.⁵³ It was to the last mentioned portion of the judgment that British opinion took especial exception. The Prime Minister, Mr. Balfour, said in the House of Commons:

"Evidently if it is left to the captain of a cruiser to decide on his own initiative and authority whether particular articles carried on a ship are, or are not, contraband, what is not merely a practice of nations, but what is a necessary foundation of equitable relations between belligerents and neutrals would be cut down to the root."⁵⁴

Such a rule would mean an unlimited capacity to extend the contraband list and that without forewarning. In response to the British protests Russian naval commanders were, on August 5, 1904, instructed "not to sink neutral merchantmen with contraband on board in the future except in cases of direst necessity; but in cases of emergency to send prizes into neutral ports."⁵⁵ The Admiralty Court at St. Petersburg reversed the decision and paid an indemnity of £100,000 to the British Government.⁵⁶

The trial court in the case of the *Thca* held that both the ship and cargo were liable to condemnation, as being engaged in the enemy's trade. The decision was reversed on appeal, compensation being given for the sinking of the ship but none for the cargo, as there had been no appeal in regard to the latter.⁵⁷

In spite of the instructions of August, 1904, Russian cruisers on June 4 and 5, 1905, sank the British merchantmen *St. Kilda* and *Ikhona* and on June 21, 1905 the Danish *Prinsesse Marie*. The decision of the original court in the case of the *St. Kilda* turned on the question whether or not the cargo was conditional contraband. Its affirmative holding was reversed on appeal and compensation granted for the value of the ship and the non-con-

⁵³ *Prize Cases*, II, pp. 54-95.

⁵⁴ *Hansard*, 4th Series, CXXXVIII, 1904, pp. 1480-1481.

⁵⁵ *Chicago Daily Tribune*, August 6, 1904.

⁵⁶ *London Times* (weekly), March 17, 1905; Hershey, pp. 144-147.

⁵⁷ *Prize Cases*, II, pp. 96-117.

traband goods destroyed, but without consequential damages.⁵⁸ The cases of the *Ikhona* and *Prinsesse Marie* were practically identical as to fact and decision.⁵⁹ In all three cases the reason for sinking was that there was no Russian or neutral port to which the vessels could be taken, and the courts held that the grounds of suspicion of contraband justified the destruction. The principle or absence of principle running throughout all these decisions was that the justification for sinking was to be drawn from the facts determining the character of the cargo rather than from the circumstances surrounding the capture. Allegations upon the latter point were poorly supported and the prize courts did not consider it essential to determine the degree of necessity and thereby to justify the act of sinking before proceeding to ascertain the nature of the cargo. They thus acted in accordance with the rules of the Russian prize regulations which permit the same treatment of enemy and neutral vessels.

Russia made use also of the simple right of capture to restrict the lawful freedom of commerce. In the case of the *Allanton* the lower court attempted to condemn a British ship sailing to Singapore from Sasebo with a cargo of Japanese coal, on the ground that her real destination was hostile and her cargo therefore contraband, and also on the ground that on her previous voyage she had carried coal from Cardiff to Sasebo. The decision was reversed and both the ship and her cargo were released.⁶⁰ Lawrence, writing of the decision of the lower court, affirmed that "any recognition on our own part of its validity would be a more serious blow to our seaborne trade than acquiescence in the capture of a few merchantmen by unauthorized cruisers." This detention appears to have been entirely unwarranted and arbitrary. Enemy property having been made incapable of being captured on neutral vessels, recourse was taken to deductions that the cargo was really destined for the enemy's fleet or naval base, drawn from the most flimsy allegations of fraud.⁶¹

⁵⁸ *Prize Cases*, II, pp. 188-225.

⁵⁹ *Prize Cases*, II, pp. 226-275, 276-310.

⁶⁰ *Prize Cases*, II, pp. 1-16.

⁶¹ See Lawrence, *War and Neutrality*, pp. 221-247.

The cases of the *Arabia* and the *Calchas* further illustrate the tendency toward extension of the contraband list and the effects of such extension, directly felt through confiscation of property; indirectly through detention of the neutral carrier and the innocent property in the same bottom. These vessels, the former German, the latter British, were carrying flour, machinery and railway material from Portland, Oregon, and from Tacoma, Washington, respectively, to Hongkong and Yokohama. In both cases the cargo owners claimed that the true consignees in Japan were commercial houses, and that the cargo was not intended for the Japanese army or navy. Both vessels, after several months' detention, were released, the *Arabia* with her cargo. The *Calchas*' cargo was more largely foodstuffs and cotton, and portions of it were confiscated.⁶² Hershey quotes a Russian official's explanation of the discrimination between the German and the English cases:

"Foodstuff consigned to an enemy's port in sufficient quantity to create the presumption that it is intended for the use of the government military or naval forces is *prima facie* contraband and sufficient to warrant holding it for the decision of a prize court. Even if consigned to private firms, the burden of proof that it is not intended for the government rests upon the consignor or consignee. If it can be proved that it is intended for non-combatants, it will not be confiscated. Small consignments of foodstuffs in mixed cargoes will be considered presumptively to be regular trade shipments and will not be seized as contraband."⁶³

The obvious tendency in these two cases was to break down the distinction between contraband and non-contraband goods by excluding the notion of conditional contraband. They resemble the case of the *Allanton* in that they are attempts to strike at enemy property by an extension of the contraband list; they differ in the degree of inference required to transform an apparently innocent destination into an actually hostile one.

The Russian Government was influenced by the protests of neutrals to the extent of incorporating into its instructions to

⁶² *Prize Cases*, II, pp. 42-53; 118-144.

⁶³ Hershey, p. 178; Quoted from *New York Times*, August 7, 1904. For the British and American Notes in protest of the Russian attitude toward *res acripitius usus* see Hershey, pp. 178-181.

naval commanders and prize courts an interpretation of the rules of Article VI, section 10 of its Prize Regulations, which admitted the doctrine of conditional contraband with regard to rice and other foodstuffs. The scope of the admission was extremely narrow, and even within the limited field of its application, whenever circumstances indicated that *res ancipitis usus* were being consigned to private individuals, thence to be transmitted to the enemy forces, they would be condemned. Henceforth, however, it was for the captor to prove the guilt of conditional contraband.⁶⁴

The discussion of Russia's efforts to evade the law of nations with regard to enemy private property at sea may be completed by a reference to her exercise of the right of visit and search. On July 13, 1904, the British P. & O. liner, *Malacca*, was captured in the Red Sea by the Russian auxiliary cruiser *Petersburg* and brought to Port Said. The *Malacca* carried 23 tons of munitions of war but the containers were plainly marked as British government stores. Two weeks after capture the *Malacca* was released.⁶⁵ With the more important issues involved in her capture we are not concerned. The incident serves as an example of the tendency toward arbitrary treatment of neutral vessels through an appreciation by the belligerent of the possibilities that now lie in the right of search.

"Instead of advance we see everywhere retrogression—days of grace shortened, the right of search used to the fullest extent without regard for the interests and susceptibilities of neutrals, no immunities granted to mail steamers,⁶⁶ the law of contraband so extended that nearly all trade with the enemy is brought within it, and that at a time when the blockade of one of the least of his ports is utterly out of the question, the penalties on neutral vessels engaged in forbidden acts arbitrarily increased . . ."⁶⁷

This arraignment of Russian conduct of maritime operations does not appear to be exaggerated, in view of the facts recited.

⁶⁴ *Parliamentary Papers*, 1905, 103, Cd. 2348, Nos. 29, 30, 39; Cited by Hershey, p. 182.

⁶⁵ Hershey, pp. 139-142.

⁶⁶ For the discussion of the treatment of mail steamers and mail bags, see Lawrence, *War and Neutrality*, pp. 185-200.

⁶⁷ Lawrence, *War and Neutrality*, pp. 262-263.

Japanese prize courts applied the principle of conditional contraband from the beginning of the war. Of a total of 64 vessels captured by them, 48 were sailing under neutral flags. Of the latter number but 14 were released. The prize court condemned 25 neutral ships for carriage of contraband.⁶⁸ The situation of Russia in the Far East being, as it was, such that cargoes destined to ports occupied by her were *ipso facto* en route to places which contained armed enemy forces, these condemnations were easily justified.⁶⁹ As to cases of enemy property covered by the Declaration of Paris, Japan followed the rule of domicile, and her decisions seem not to have been challenged by European or American opinion. Japan was in the fortunate position of being able easily to follow the accepted rules of law, and this she did strictly but without attempting to inaugurate any advance. Like that of Russia, her decree published February 11, 1904,⁷⁰ aroused neutral protest for its listing of provisions as conditional contraband. "Quelques-unes des prohibitions édictées sont tellement surannées que leur rappel après leur condamnation depuis longtemps universelle, a dû nécessairement provoquer une véritable stupéfaction. Il en est ainsi, en particulier, de celles relatives à l'argent et aux vivres."⁷¹ The same writer points out that in the South African war the English restored cargoes seized on neutral ships at the demand of the United States, and that "comme la pratique, les législations nationales, et les traités, depuis deux siècles et demi, ont aussi édicté l'immunité des vivres."⁷²

⁶⁸ *Prize Cases*, I, vi-xxvi.

⁶⁹ Kleen points out that, as Japanese naval vessels could capture a vessel on presumption that the cargo was destined to be employed by the enemy army or fleet, the way was left open to arbitrary seizures; "Les décrets prohibitifs" in *R. G. D. I. P.*, XI, 1904, p. 359.

⁷⁰ *R. G. D. I. P.*, XI, 1904, Documents, p. 13.

⁷¹ Kleen, *R. G. D. I. P.*, XI, 1904, p. 355.

⁷² *Ibid.*, p. 355. His supposition as to the reason why Russia declared cotton contraband shows that even at that date cotton was considered relatively unimportant as an ingredient in the manufacture of explosives: "L'interdiction étrange du coton qui figure dans l'ordonnance moscovite de 1904 ne peut s'expliquer que par la supposition du gouvernement russe que les Japonais se trouvant par hasard avoir momentanément un besoin pressant de coton pour quelque but se rattachant à l'équipement des troupes, la prohibition de cette matière première pourrait leur rendre cet équipement plus difficile". *Ibid.*, 356-57. For text of Russian decree see same volume of the *Revue*, Documents, p. 13.

To the effectual application of the existing limitations upon capture the extension of the list of contraband by belligerents is the most dangerous impediment because the most insidious and the most readily accomplished on the basis of temporary selfish interest. In 1877 Russia added only sulphur and saltpetre to the list of contraband generally recognized; in 1904 she added provisions, combustibles of all kinds, materials for the construction of ships of all sorts, horses, and other beasts of burden, telegraphic and telephonic apparatus, railway materials, sulphur, saltpetre, and cotton. Japan omitted cotton from her list; otherwise, it was practically as extensive. Lawrence takes the figures for Japanese imports in 1902, £29,000,000, and asserts that if Russia had not made "concessions from her first contraband list, £21,000,000 of this amount would have been liable to capture," and that £16,000,000 did remain liable.⁷³ At the time English goods in English vessels and American goods in American vessels constituted the greater part of these imports, so that Russia, given a fleet strong enough to maintain her prohibition, might have cut off the bulk of her enemy's commerce without blockading a single port.⁷⁴ Kleen put the query which will have to be pursued in dealing with subsequent practice: "En continuant de marcher dans cette direction, à quels résultats refinirait-on pas par aboutir?"⁷⁵

In the war between Italy and Turkey, which began on September 29, 1911, the Porte failed to accord any *délai de faveur* to enemy ships within Turkish ports or entering them ignorant of the outbreak of hostilities. In the decision of the Smyrna prize court, November 7, 1911, the justification for the capture of practically all of the Italian vessels found in Turkish harbors was that they belonged to a type which was destined to remain

⁷³ "La question de la contrebande" in *R. G. D. I. P.*, XII, 1905, p. 7.

⁷⁴ Discussing the danger to peace that a similar situation involving vaster commercial interests might create, Lawrence says: "The freedom of neutrals to carry into the unblockaded commercial ports of belligerents cargoes of provisions for the use of the civil population is indeed of such vital importance to a country like England which imports the major part of its food that the British people would in all probability have undertaken a great war to defend the doctrine by which grain and meat may not be declared contraband unless destined to the army or navy of a belligerent or to a place besieged by the enemy". *Ibid.*, pp. 7-8.

⁷⁵ *R. G. D. I. P.*, XI, 1904, p. 362.

within the ports, that their owners could not therefore derive profit from delay, and that the Hague convention upon the subject contemplated real merchant vessels capable of leaving port unless prevented by *force majeure*.⁷⁶

Italy had simply to apply article 243 of her marine mercantile code. This she did by issuing on October 4, 1911, instructions to her port captains. The two articles of these instructions that concern the present matter are the first and third. The first provides:

"Que les navires tures qui se trouvaient dans les ports au moment de la déclaration de guerre, ou qui y sont arrivés en ignorant cette déclaration soient pourvus d'un sauf-conduit pour rejoindre soit la Turquie, soit leur destination ultérieure." The third leaves indefinite the duration of the *délai*: "Qu'aux navires tures, dont la relâche est forcée, il soit permis de rester dans les ports le temps nécessaire pour reprendre avec sécurité leur voyage."⁷⁷

Under the terms of these instructions the *Chauki*, a Turkish vessel which had left Gaza before, and reached Tripoli after the outbreak of the war, was held not liable to confiscation.⁷⁸

Turkey disregarded also both her own previous practice and the consensus of international opinion expressed in article 3 of the 6th Hague convention of 1907, since she captured Italian vessels found at sea in ignorance of hostilities.⁷⁹

Italy on the 13th of October, 1911, instructed her prize courts and naval captains to observe the Hague regulation above mentioned.⁸⁰ The cases of the *Neua*, *Sheffield*, and *Sabah* indicate a strict interpretation of the rule of ignorance.⁸¹

Of general interest was the question whether Article 211 of the Italian code would be applied in case the Turkish Government without making formal announcement of its policy should abstain from the capture of private property under the enemy's

⁷⁶ "Tribunale delle prede di Smirne" in *Rivista di Diritto Internazionale*, Série II, I, p. 146.

⁷⁷ "Chronique" in *R. G. D. I. P.*, 21, p. 266, n. 2.

⁷⁸ "Cronaca e commento" in *Rivista*, II, I, p. 552, n. 4.

⁷⁹ *R. G. D. I. P.*, 21, 1914, pp. 248, 259, and 268.

⁸⁰ *R. G. D. I. P.*, 21, 1914, p. 107, n. 3; also in *Rivista*, II, I, p. 562. Instructions "desired" observance of Declaration of London.

⁸¹ *R. G. D. I. P.*, 21, 1914, p. 268, and n. 3; p. 269, n. 1.

flag. This question was answered from the standpoint of law by the Italian prize court in the case of the *Sabah*, in which it was declared that by the terms of Article 211 a positive and formal enunciation within a definite time was required.⁸² It was answered for the purposes of the war by the verbal note of the Italian Minister of Foreign Affairs, of October 4, 1911.⁸³ This communication enumerated the customary list of undoubted contraband, followed the enumeration with a general classification of "les munitions de guerre, les objets d'équipement militaire de tout genre, et en général tout ce qui, sans manipulation, peut servir immédiatement pour l'armement maritime ou terrestre," and laid down the attitude of his government as to capture:

"Le Ministère royal des affaires étrangères a l'honneur de signifier en même temps que, comme le Gouvernement ottoman n'a accompli aucun acte démontrant son intention d'exempter de la capture les bâtiments de commerce italiens et comme, par contre, des actes de saisie et de capture ont été effectués par le Gouvernement ottoman au préjudice des navires de commerce italiens, le Gouvernement royal, conformément aux dispositions des lois en vigueur et aux principes du droit des gens généralement admis, se réserve la faculté d'exercer son droit de capture et de prise sur les navires marchands ottomans."

On October 12, 1911, Turkey declared that enemy ships and enemy cargoes on board them should be liable to capture but that neutral goods should only be so liable if contraband.⁸⁴ In the same month the Porte published a long list of articles which it would consider contraband, including therein grain and provisions.⁸⁵ On November 1, 1911, this list was replaced by another identical with that of Italy, and it was announced that the ships which transported contraband of war should be confiscated only if the contraband, by value, weight, volume or freight comprised more than one-half of the cargo.⁸⁶

Italian law and practice in regard to the destruction of merchant vessels accorded with the generally advanced attitude of Italy upon the question of maritime capture. Authorized by

⁸² *Ibid.*, p. 246.

⁸³ *Rivista*, II, I, 1912, pp. 559-560.

⁸⁴ *Rivista*, II, I, p. 560.

⁸⁵ *Ibid.*, pp. 561-562.

⁸⁶ *Rivista*, II, I, p. 562.

Article 14 of the Instructions of October 13, 1911, to destroy a prize only if to conduct it to port would jeopardize the security of the captor ship or the success of naval operations, Italian warships apparently found no such necessity to arise—though concerned in one way or another with some 800 enemy and neutral merchantmen.⁸⁷ Her early acquisition of the mastery of the sea left to Italy an easy recourse to the conduct according with law and with the interests of herself and neutrals.

The conduct of maritime operations was attended with almost no important controversies between Italy and neutral powers, whose good-will Italy had every reason to cultivate. We do not come upon the irritating attempts to defeat the spirit of the law of nations by extending the contraband list, by a rigid application of the doctrine of continuous voyage, or by a harsh application of the right of visit and search. The case of the *Carthage* serves to illustrate, however, that Italy was quite ready to stand upon a liberal interpretation of her rights. The destroyer *Agordat* having arrested and conducted to Cagliari the French mail steamer *Carthage*, Marseilles to Tunis, on January 16, 1912, because that vessel was transporting an aeroplane to a French aviator at the latter port, the Italian Government consented to submit the question of the legality of the "capture and temporary seizure" to the Hague Court. The five eminent members of the arbitral tribunal decided that the circumstances did not "constitute sufficient juridical reasons to believe in a hostile destination and consequently to justify the capture of the vessel which was transporting the aeroplane," and that therefore "the Tribunal is not called upon to inquire whether or not the aeroplane should by its nature be included in articles of contraband either conditionally or absolutely, or to examine whether the theory of a continuous voyage should or should not be applicable in this case."⁸⁸

The Balkan Wars of 1912-13 raised no serious issues between belligerents and neutrals so far as maritime operations were concerned. Greece included coal and machine oil in her list of contraband, and the exportation of cottonseed oil and oleo from

⁸⁷ *R. G. D. I. P.*, 21, p. 248; p. 269.

⁸⁸ "Award" in *A. J. I. L.*, VII, 1913, p. 627; also in *R. G. D. I. P.* XX, 1913, Documents, p. 35.

the United States was somewhat restricted until it was demonstrated that these oils were not of the contraband varieties.⁸⁹ Although Turkish shipping decreased in tonnage, the annual decrease in the years of war was not so great as that which occurred in 1914. Turkey's shipping, exclusive of small sailing vessels, decreased from a total of 202,692 tons at the end of 1911, to 133,158 tons at the end of 1914. It fell off 21,000 tons in 1912; 24,000 tons in 1913; and 24,000 tons in 1914. During the year 1915 it just maintained the total reached in 1914.⁹⁰ On the other hand, the commerce of Turkey quite considerably increased during the war, as is shown by the following brief table:

Date	Imports	Exports
1910	£ T. 33,382,556	£ T. 18,198,447
1911	37,774,913	22,474,818
1912	43,551,035	23,921,326 ⁹¹

The truth is that action against commerce during the Balkan Wars was comparatively of such small importance as to render any analysis unfruitful.⁹²

Our examination of European practice has brought us now to the latest period. We have noted that up to 1856 the struggle for neutral rights centered upon the question of immunity of enemy property from capture when transported in neutral vessels. In the succeeding period the value of the rule of immunity for that category of commerce has been severely tested. Bel-ligerents have not hesitated to devise and employ expedients the purpose or tendency of which was to annul the progress signalized at the Congress of Paris. Alongside this unfavorable line of development has appeared the all too meagre account of the acts and efforts of governments which have evidenced the vitality of the principle of immunity by a complete or partial prac-

⁸⁹ Schurman, J. G., *The Balkan Wars* (Princeton, 1914), p. 51.

⁹⁰ *Hazell's Annual* (London), 1912, p. 343; 1913, p. 350; 1914, p. 300; 1915, p. 289; 1916, p. 278.

⁹¹ *Statesman's Year Book* (London), 1915, p. 1405.

⁹² Martens, N. R. G. as yet includes no documents relating to the present subject as involved in the Balkan Wars of 1912-13, and no discussion of the conduct of operations against commerce has appeared in the *R. G. D. I. P.*; the *R. D. I.*; the *A. J. I. L.*; or the *London Times*.

tice of that principle. The way should now be clearer to an appreciation of the issues raised in the European War and to conclusions upon the prospect for the ultimate realization of immunity as a principle and in practice.

CHAPTER III

THE ATTITUDE OF THE UNITED STATES TOWARD
THE RIGHT OF CAPTURE

The United States, fighting a war for independence from the greatest of maritime powers at a time when the belligerent and neutral worlds were united against England because of her maintenance of the ancient rules of maritime warfare, naturally incorporated into its first treaty, the commercial agreement of 1778 with France, the "twin maxims" of Utrecht.¹ The greater freedom which the first of these principles expressed agreed with the interests and the temper of the new republic since in but one of its subsequent treaties has it included the opposing regulations upheld by the mother country.² Treaties of 1782 with the United Provinces,³ 1783 with Sweden,⁴ and 1800 with France⁵ stipulated that free ships should make free goods and enemy ships, enemy goods.

Before the last date the United States had made treaties in which the first of the "new" rules, namely, that free ships make free goods, stood alongside of the second "English" rule which provided that neutral goods in enemy vessels should be free from capture. This is true of the treaties of 1787 with Morocco,⁶ of 1795 with Spain,⁷ of 1796 with Tripoli,⁸ and of 1797 with Tunis.⁹ It would, therefore, have been impossible to say of the period after 1780 what a defender of England's position toward the Armed Neutrality has written of the preceding

¹ Martens, *Rec.* II, pp. 594, 597.

² Jay Treaty; but compare Art. XII of Treaty of 1799 with Prussia quoted *infra*.

³ Martens, *Rec.* III, p. 439.

⁴ *Ibid.*, pp. 568, 572.

⁵ *Ibid.*, VII, p. 103.

⁶ *Ibid.*, IV, p. 247.

⁷ *Ibid.*, VI, p. 143.

⁸ *Ibid.*, p. 298.

⁹ Martens, *Rec.*, VI, p. 406.

period. Manning, speaking of the absence from the manifesto of the Northern Confederacy of the second principle of the "Dutch system," said: "But never had there been, among Christian powers, a treaty which conveyed the former immunity without also engaging the latter privilege."¹⁰

It has already been noted that this country did not make it a *sine qua non* of its agreements upon the question of neutral rights at sea that they be guaranteed unconditionally. Professor Moore cites but five treaties in addition to the four above mentioned in which the United States followed out the program of the league of the northern neutrality and set precedents for the practice in the Crimean War, those of 1785 with Prussia,¹¹ 1805 with Tripoli,¹² 1816 with Algiers,¹³ 1828 with Prussia,¹⁴ and 1836 with Morocco.¹⁵ In 1860 the same provisions appeared in a treaty with Venezuela.¹⁶

The treaty of 1785 with Prussia contained the following article:

"If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other"¹⁷

Benjamin Franklin had tried in vain two years earlier to have the principle of complete immunity embodied in the treaty with Great Britain. As Bentwich says, he was "the originator of the movement in practical politics."¹⁸ He represented a new

¹⁰Manning, p. 335.

¹¹Martens, *Rec.*, IV, p. 42.

¹²Malloy, W. M., *Treaties, etc., between the United States and Other Powers* (Washington, 1910), II, p. 1788.

¹³Martens, *Nouveau recueil*, V, *Supp.*, p. 6.

¹⁴*Ibid.*, VII, 2, p. 615.

¹⁵*Ibid.*, XIII, p. 685; Moore, J. B., *Digest of International Law*, (Washington, 1906), 7, p. 435.

¹⁶Malloy, II, p. 1845.

¹⁷Martens, *Rec.* IV, p. 42.

¹⁸Bentwich, p. 85.

nation with a small navy and unlimited commercial potentialities. In 1785 he was negotiating with Frederick the Great, who derived satisfaction from being regarded as a reformer as long as the reputation cost him nothing. Article XII of the treaty above quoted placed it in the small class of treaties signed up to that time which exhibited especial consideration for neutral rights. Article XXIII, however, is the one which makes the treaty unique; it reads:

"If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance . . . *And all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessities, conveniences, and comforts of human life more easy to be attained and more general shall be allowed to pass free and unmolested; . . .*"¹⁹

The treaty of 1785 expired by its own limitations in October, 1796. Three years later Prussia and the United States entered into a second treaty, Article XII of which reads:

"Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and safety of the neutral navigation and commerce in future wars. And if in the interval either of the contracting parties should be engaged in a war to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant vessels of the neutral Power as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged."²⁰

¹⁹ Martens, *Rec.* IV, p. 47. (Italics by the writer).

²⁰ Martens, *Rec.*, VI, pp. 676-8. This latter section appears to permit of action under the "English Rule" or even of the extreme practice to which the application of the rule of hostile infection led.

Article XXIII remained as in the treaty of 1785 only as far as the section providing for complete immunity, which was excluded in its entirety.²¹

To complete the survey of the three treaties with Prussia it is necessary to quote from that of 1828. Article XII therein provides:

"The twelfth article of the treaty of amity and commerce concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty."²²

This provision, therefore, includes Article XIII of the treaty of 1799, repeated from that of 1785, stipulating that contraband shall not be confiscable upon the ships of either party, but shall be subject to requisition. It leaves the neutral flag inviolable even for the carriage of contraband, thereby going a step beyond the future Declaration of Paris, but it does not revive the immunity of enemy property provided for by the treaty of 1785.

Under pressure the United States plenipotentiary agreed to Article XVII of the treaty with England of 1794, by which "if any property of an enemy should be found on board such vessel, [of the other party being neutral] that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment."²³ This article expired October 28, 1807,²⁴ and it has not been renewed; neither do provisions concerning this question appear in any subsequent treaties of the United States with Great Britain.

²¹ *Ibid.*, pp. 686-8. This fact Oppenheim overlooks when he corrects Perels and declares that Article XII of the treaty of 1828 expressly adopts the immunity of private property by renewing the twenty-third article of the treaty of 1799; Oppenheim, II, p. 221, n. 2. Westlake has a similar misstatement; II, p. 129.

²² Martens, *N. R.*, VII, 2, pp. 619-620. For a convenient source containing the three treaties in English see Niemeyer, *Urkundenbuch zum Seekriegsrecht*, I, pp. 22-34.

²³ Martens, *Rec.*, V, p. 672.

²⁴ Malloy, I, p. 601, n. A.

Not only, however, has the United States partially sacrificed its doctrine of immunity by consenting to numerous treaties which permit the capture of neutral property in the ships of enemies;²⁵ but it has introduced into a number of treaties the principle of reciprocity according to which free ships are to mean free goods only in cases where the enemy grants the same privilege to neutrals. The treaty with Spain of 1819 contains an article to that effect. It reads:

"With respect to the 15th article of the same treaty of friendship, limits, and navigation of 1795, in which it is stipulated that the flag shall cover the property, the two high contracting parties agree that this shall be so understood with respect to those Powers who recognize this principle; but if either of the two contracting parties shall be at war with a third party, and the other neutral, the flag of the neutral shall cover the property of enemies whose Government acknowledge this principle, and not of others."²⁶

The same provision occurs in the treaty with Colombia of 1824,²⁷ in that with Central America of 1825,²⁸ and in other treaties as late as that of 1871²⁹ with Italy, and that of 1887 with Peru.³⁰ The reciprocity provision occurs both in treaties which confer immunity upon neutral property in enemy ships and in treaties which permit its capture and condemnation. In

²⁵ For list of United States treaties containing the so-called Dutch principles see Moore, *Digest*, VII, p. 436; also in Hall, *International Law*, 6th ed. p. 693, note. Hall is in error in including our treaty of 1854 with Russia; see Malloy, II, p. 1520.

²⁶ Martens, *Rec., Supp.*, IX, Pt. 1, p. 343; Malloy, II, p. 1656. Professor Moore states that a similar stipulation existed in the treaty with France of 1778. *Digest*, VII, p. 436. The writer is unable to discover such a stipulation in the treaty. Article XXIII provides: "It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. . . . And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted". See Martens, *Rec.* II, p. 597.

²⁷ Martens, *N. R. Supp.*, X, 2, p. 994.

²⁸ *Ibid.*, p. 832.

²⁹ Martens, *Nouveau recueil général*, I, p. 57.

³⁰ *Ibid.*, XXII, p. 63.

six treaties of the United States: those with Russia of 1854;³¹ the Two Sicilies, 1855;³² Peru, 1856;³³ Bolivia, 1858;³⁴ Hayti, 1864;³⁵ and the Dominican Republic, 1867,³⁶ reciprocity is demanded, but in milder terms. The treaty of 1854 with Russia by Article III provides:

"It is agreed by the High Contracting Parties that all nations which shall or may consent to accede to the rules of the first Article of this Convention [that free ships make free goods] by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two Powers signing this convention."

Article XIX of the treaty of 1864 with Hayti engages the contracting parties "to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them as permanent and immutable." The same provision occurs in the treaty with the Dominican Republic, 1867, Article XV.

Secretary of State Madison declared the position of the United States to Mr. Armstrong, Minister to France, on March 14, 1806:

"The United States cannot, with the same consistency as some other nations, maintain the principle [that free ships make free goods] as already a part of the law of nations, having on one occasion admitted and on another stipulated the contrary. They have, however, invariably maintained the utility of the principle, and whilst as a pacific and commercial nation they have as great an interest in the due establishment of it as any nation whatever, they may with perfect consistency promote such an extension of neutral rights."³⁷

His references are undoubtedly to the treaties of 1799 with Prussia and of 1794 with Great Britain.

The reply of Mr. Jefferson, when secretary of state, to M.

³¹ *Ibid.*, XVI, 1, p. 572.

³² *Ibid.*, p. 570.

³³ *Ibid.*, XVII, 1, p. 191.

³⁴ Malloy, I, p. 114.

³⁵ *Ibid.*, p. 926.

³⁶ *Ibid.*, p. 408.

³⁷ *MS. Inst. U. S. Ministers*, VI, p. 322; Moore, *Digest*, VII, p. 440. It may be doubted whether Madison could have named a single state whose practice over a considerable period of time justified its maintenance of the principle as a rule of law.

Genet, July 24, 1793, which has become a classic for the expression of the American view, is but one of a large number of declarations by American officials, judges, and publicists³⁸ which agree in supporting the *Consolato del Mare* as the common law on the subject of capture, to be observed invariably in the absence of treaty stipulations in a contrary sense:

"I believe it cannot be doubted, but that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels, in the cases above mentioned, and I confess I should be at a loss on what principle to reclaim it. It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods—a principle much less embarrassing to commerce and equal to all parties in point of gain and loss; but this is altogether the effect of particular treaty, controlling, in special cases, the general principle of the law of nations, and, therefore, taking effect between such nations only as have so agreed to control it."³⁹

It may be remarked that the United States was at this time a neutral. To emphasize the adherence of the United States to the common law when itself at war and to overlook its admission of the same principles when neutral would be unscientific. Continuously following the practice of older nations in its wars, the United States has as consistently maintained the value of a free neutral flag. Changing circumstances have not altered the tone of official directions to representatives abroad. In 1816 Secretary of State Monroe maintained the desirability of obtaining a treaty with England which should protect enemy goods in United States bottoms from capture, although "the importance of this rule is much diminished to the United States by

³⁸ e. g., Kent, James, *Commentaries on American Law*, Eighth ed. (New York, 1854), I, p. 126: "But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well settled principle of the law of nations." See also Marshall's opinion *The Nereide*, 9 Cranch, 388; Scott, *Cases*, p. 385.

³⁹ *American State Papers*, Foreign Relations, I, pp. 166-167.

their growth as a maritime power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels." He based his opinion upon the fact that the newer rule "would prevent vexatious seizures by beligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."⁴⁰

It has already been said that in ten of its treaties the United States has stipulated unconditionally for the rule free ships, free goods, while in others it has agreed to the accompanying enemy ships, enemy goods. Chief Justice Marshall in the case of *The Nereide* took note of this fact after he had summarized a similar situation in the treaties of foreign states:

"Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods, and that friendly goods shall be safe in the bottom of an enemy. It is, therefore, clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other."⁴¹

The opinion in this case, original with Marshall, is evidence that if American courts followed English decisions in the absence of treaty clauses, they were quite as careful to take full account of such clauses where they existed.

⁴⁰ Monroe to Adams, May 21, 1816, *MS. Inst. U. S. Ministers*, VIII, p. 61; Moore, *Digest*, VII, p. 441.

⁴¹ 9 Cranch, 388 ff., Scott, *Cases*, p. 887. Marshall in the same case holds that neutral property otherwise immune from capture is not rendered confiscable by the fact that the merchant vessel transporting it is armed: "It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a dictum should be found in the books pointing to such construction." He based his opinion upon the right of a neutral to transport his goods in the ship of a friend and refused to admit that the "differences in the degree of capacity" of the carrier to avoid capture and to prevent search could be regarded as restricting the complete right of the neutral. His opinion received confirmation in the case of *The Atalanta* (1818), 3 Wheaton, 409. It disagreed with that in the English case of *The Fanny*, 1 Dodson, 443.

In 1823, the year in which France, intervening in Spain, temporarily dispensed with the right of capture at sea, President Monroe through Secretary of State Adams instructed American representatives in Europe to urge the abolition of capture upon the governments to which they were respectively accredited. France was inclined to accede to the proposition and Russia expressed sympathy toward it. Great Britain refused to entertain or discuss the proposal, which accordingly fell to the ground.

In 1826, in the instructions to the delegates from the United States to the Panama Congress, Secretary of State Henry Clay pointed out that though motives of self-interest had grown less important, this Government still maintained its attitude looking toward freeing private property from the danger of capture at sea, as it had already been freed on land.⁴²

President Pierce took immediate advantage of the Franco-British agreement of 1854 to send identic propositions to the governments of Europe and America for conventions which should incorporate the principles of immunity for neutral goods on enemy vessels and of enemy goods on neutral vessels.⁴³

The United States had not, however, considered it possible to separate the two questions of privateering and capture in 1785 nor in 1823, and it acted consistently with its previous attitude in its refusal to accept the abolition of privateering as long as the property of its citizens in time of war should remain liable to confiscation. The United States was in the embarrassing situation of being unable to adhere to the rules which it had urged upon other governments. President Pierce had pointed out in his annual message in 1854 the danger that would attend a renunciation of privateering by a Power with a large mercantile fleet and a small navy.⁴⁴ The arguments and the facts were elaborated by Secretary of State Marcy on July 28, 1856 in a communication to Count Sartiges, the French minister at Washington, who had extended an invitation to this Government to

⁴² Butler, C. H., "Immunity of Private Property" in *Report of 18th Conference of the International Law Association* (London, 1900).

⁴³ *Annual Message*, December 4, 1854, Richardson, V, p. 275. For results of this action see Ch. II of the present discussion.

⁴⁴ Richardson, V, p. 276.

adhere to the Declaration. In his reply Secretary Marcy offered to do so if the first article of the Declaration should be amplified so as to provide that "the private property of subjects or citizens of any one of the belligerent powers shall not be subject to seizure by the vessels of the other unless it consist of contraband of war."⁴⁵ Russia promised to support this proposal if it should become "the subject of deliberation in common among the Powers";⁴⁶ France, Prussia, Holland, and Sardinia were inclined to favor it;⁴⁷ the opposition of the British Government prevented a reply from that country until, upon the accession of Buchanan to the presidency, negotiations were ordered suspended, and they were not resumed during his term of office.⁴⁸ Yet in 1858 the treaty of the United States with Bolivia was so framed as to admit of a later amendment abolishing the right of capture.⁴⁹ And in 1859 the Department of State announced to the great Powers that:

"With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property on board a neutral ship, is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial powers in this position. . . . It is not necessary that a neutral power should have announced its adherence to this declaration in order to entitle its vessels to the immunity promised. Because the privilege of being protected is guaranteed to belligerents, co-parties to that memorable act, and protects their property from capture wherever it is found on board a vessel belonging to a nation not engaged in hostilities . . . such an immunity withheld from this country would in fact operate as a premium, granted to other nations, and would be almost destructive of that important branch of our national industry, the carrying trade."⁵⁰

⁴⁵ *British and Foreign State Papers*, 55, pp. 589-599.

⁴⁶ *MS. Inst. Prussia*, XIV, p. 239; Moore, *Digest*, VII, p. 566.

⁴⁷ *MS. Inst. Portugal*, XIV, p. 185; Moore, *Digest*, VII, p. 567. For replies to Marcy's proposal and general discussion of the effect it produced in foreign countries see Niemeyer, *Urkundenbuch*, I, pp. 69-121.

⁴⁸ *MS. Inst. Great Britain*, XVII, p. 71; Moore, *Digest*, VII, p. 567. M. Laveleye quotes from Secretary Marcy's note extensively and says that the United States had considerable justification for refusing to accept the suppression of privateering, if the larger and only logical principle of the suppression of the right of capture were not admitted concurrently. *R. D. I.*, VIII, 1875, p. 566.

⁴⁹ Malloy, I, p. 114.

⁵⁰ *MS. Inst. France*, XV, 455; Moore, *Digest*, VII, p. 450.

On April 24, 1861, Secretary Seward sent to the ministers of the United States in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, Denmark, and Holland drafts of conventions according to the terms of which this Government would consent to adhere to the Declaration of Paris.⁵¹ The accompanying notes stated that

"the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war." But as "Europe seems once more to be on the verge of quite general wars," and as "a portion of the American people have raised the standard of insurrection and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States, prudence and humanity combine in persuading the President under the circumstances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to attain the greater one . . ."

President Lincoln's proffer of adherence was prompted by his desire that foreign powers should treat the Confederate privateers as pirate ships. When Great Britain and France recognized the "insurgents" as "belligerents," and declared that it would be essential to introduce into their conventions with the United States a declaration of non-intention to become implicated in the internal conflict in the latter country, Secretary Seward terminated negotiations, expressing the hope that within the near future they might be reopened with increased prospect of success.⁵² Six years later as circumstances were adjudged unfavorable the same Secretary of State declined to submit the Marcy amendment to the consideration of the powers, though urged to do so by the Italian Government.⁵³

In the War of 1812 there was no accepted rule among the nations which protected neutral property in enemy ships, so that

⁵¹ Moore, *Digest*, VII, pp. 570-573.

⁵² For the negotiations of the United States concerning the Declaration of Paris see Moore, *Digest*, VII, pp. 561-583. Mr. Seward interpreted the proposed qualifying declaration to mean that the powers "should be at liberty to recognize the United States rebels as a maritime power equal under the treaty of Paris to the United States themselves". *MS. notes to Italy*, VI, p. 344, 1867; Moore, *Digest*, VII, p. 467.

⁵³ *MS. Inst. Prussia*, XIV, p. 504; Moore, *Digest*, VII, p. 467.

the instructions of the United States Government to its naval officers to destroy enemy merchant vessels could be carried into effect without placing the Government under obligation to pay the large indemnities which present-day evasion of the spirit of the rule above mentioned would seem to entail. In the War of the Rebellion, Confederate armed vessels were careful to respect the ships of neutrals, but they sank and burned the ships of enemies without scruple. The practice of the Southern Confederacy showed it to be undeniable that the power to destroy the vessels of enemies before adjudication in a court of prize was extremely dangerous in view of the latitude within which a belligerent could interpret "necessity."

The United States Government was not bound in the Civil War to observe the Declaration of Paris. The goods of enemies in neutral vessels might therefore have been captured and confiscated without necessity for the development of the principle of continuous voyage which, as we have already seen, had been applied to a slight extent in the Crimean War. The Government of the United States chose, however, to observe the Declaration.⁵⁴

The cases of the *Bermuda*,⁵⁵ the *Stephen Hart*,⁵⁶ the *Springbok*,⁵⁷ and the *Peterhoff*⁵⁸ are familiar to all students of the history of the doctrine of continuous voyage. Chief Justice Chase handed down the decisions in the first two cases together. The cargoes of both were condemned in their entirety, part as being contraband ostensibly destined to neutral ports, but actually intended for belligerent ports, the remainder as being consigned to the same persons as were the real consignees of the contraband goods. The ships were also condemned on the ground that the contraband shipment was made with the consent of the owners, given in fraud of belligerent rights.

The cargo of the *Springbok* was condemned for attempt to run the blockade, the court through the Chief Justice declaring its belief that the owners of the cargo intended that it should

⁵⁴ Moore, *Digest*, pp. 570-574.

⁵⁵ Wallace, 111, pp. 514-559.

⁵⁶ *Ibid.*, pp. 559-560.

⁵⁷ *Ibid.*, V, pp. 1-28.

⁵⁸ *Ibid.*, pp. 28-62.

be transshipped at Nassau into some vessel more likely than the *Springbok* to succeed in reaching safely a blockaded port, “. . . the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.”⁵⁹ The ship was released as having been engaged in a *bona fide* voyage to the port of Nassau. It is of great interest to note that in this case the court clearly laid down the application of the continuous voyage doctrine to any sorts of cargoes when their ultimate destination was a blockaded port. Although the Chief Justice takes note of the fact that only a small part of the cargo is absolute contraband, he immediately says:

“But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.”⁶⁰

The *Peterhoff* case resembled the cases above discussed in that the vessel was neutral and was carrying a mixed cargo of contraband and non-contraband goods between neutral ports, under circumstances which indicated that at least the contraband was intended to reach persons within the Confederacy. It differed from those cases in that the second part of the transport was to be accomplished overland. Instead of transshipping the cargo at some West Indian port, thence to take the chance of capture in attempting to run the blockade of the Southern ports, the consignors intended to unload it at the Mexican port of Matamoros, across the Rio Grande from Brownsville in Texas.

The Chief Justice condemned the contraband goods and those which belonged to the owner of the contraband. The ship and the remainder of the cargo were released. The court pointed out that the Rio Grande was a boundary river, preserved by treaty from being blockaded. Hence “neutral commerce with

⁵⁹ Wallace, V, p. 28.

⁶⁰ *Ibid.*, p. 26.

Matamoras, except in contraband, was entirely free.”⁶¹ As Brownsville lies further up the river than blockading vessels can navigate, the question before the court narrowed down to this: Did “an ulterior destination to the rebel region which we now assume as proved [affect] the [neutral] cargo of the *Peterhoff* with liability to condemnation”?⁶²

The answer of the court was an emphatic negative. The principles laid down in the *Bermuda* and similar cases were reaffirmed, but by reference to precedent in the cases of the *Stert*,⁶³ the *Ocean*,⁶⁴ and the *Jonge Pieter*,⁶⁵ the “lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation” was established.⁶⁶ This portion of the opinion is of practical value to those who are today studying the embargo which Great Britain has placed over all sorts of goods entering neutral ports near to Germany, when the goods cannot be proved to be for consumption within the neutral countries. The learned Chief Justice said:

“Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such a trade, with unrestricted inland commerce between such a port and the enemy’s territory, undoubtedly and very seriously impairs the value of a blockade of the enemy’s coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.”⁶⁷

On another page these “lessons” are thus summarized:

“ . . . contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles

⁶¹ *Ibid.*, p. 54.

⁶² *Ibid.*

⁶³ Robinson, IV, p. 65.

⁶⁴ *Ibid.*, III, p. 297.

⁶⁵ *Ibid.*, IV, p. 79.

⁶⁶ Wallace, V., p. 56.

⁶⁷ *Ibid.*, p. 57.

not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoros and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoros."⁶⁸

These four decisions may be thus epitomized: Non-contraband goods, being transported in neutral ships toward neutral ports, may be captured and confiscated if their ultimate destination may be presumed to be a blockaded port; such goods may not be confiscated when the continuance of the voyage is to be inland. The Supreme Court advanced a considerable distance toward the abrogation⁶⁹ of the rule of free ships, free goods, but it did not go the whole way.

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exceptions of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."⁷⁰

This article of the treaty between the United States and Italy of February 26, 1871, marks it as the only international agreement now in effect that provides for complete immunity of non-offending private property. It is the logical result of the identical tendencies of the two countries in this respect but its importance can hardly become great in practice. Its significance lies in its attestation that the principle it embodies is worthy of a place in the agreements of two important powers.

In 1880 Secretary of State Evarts notified the Government of Peru, at war with Chile, that the treaty of 1870 which provided for the freedom of the neutral flag covered the cases which Peru

⁶⁸ *Ibid.*, p. 59.

⁶⁹ See article by Baldwin, S. E., "The 'Continuous Voyage' Doctrine During the Civil War and Now," in *A. J. I. L.*, 9, 1915, pp. 793-802.

⁷⁰ Martens, *N. R. G.*, I, p. 57.

was threatening to exempt from its operation.⁷¹ Chile was exporting cargoes of nitrate from a section of the Peruvian coast which she had occupied and which Peru refused to regard as beyond her jurisdiction. Mr. Evarts declined to admit the possibility of legal seizures of American vessels carrying such nitrate.

"In the recent war with Spain we necessarily enforced the rule of capture, as there was no response to our proclamation that we would not resort to privateering; and, as the implied retention of that right by Spain rendered our commerce subject to capture, we were bound to reserve and exercise every right of war as against our enemies."⁷²

Spain, however, failed to make any captures of American merchantmen and it would seem that the United States allowed to pass an excellent opportunity for putting into operation the liberal doctrine it has been urging for more than a century.⁷³

On April 26, 1898, President McKinley declared that the neutral flag should cover enemy goods not contraband, and that neutral goods, except contraband, should not be liable to confiscation under the enemy's flag.⁷⁴ Three days earlier Queen Maria Cristina issued a decree, Article III of which read:

"Notwithstanding that Spain is not bound by the declaration signed in Paris on the 16th of April, 1856, as she expressly stated her wish not to adhere to it, my government, guided by the principles of international law, intends to observe and hereby orders that the following regulations for maritime law be observed:

"(a) A neutral flag covers the enemy's goods except contraband of war.

"(b) Neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag."⁷⁵

The peculiar situation of war between the two more important of the three Powers that had not signed the Declaration of Paris provided an opportunity for demonstrating the attitude of both

⁷¹ Martens, *N. R. G.*, I, p. 97.

⁷² Butler, C. H., "Freedom from Capture of Private Property at Sea," in *North American Review*, 168, 1899, p. 57.

⁷³ Two considerations hindered such action: (1) the comparative weakness of the Spanish navy was not realized and (2) no preliminary arrangement had been effected regarding prize money.

⁷⁴ *Foreign Relations of the United States*, 1898, p. 772.

⁷⁵ *Ibid.*, p. 774.

Powers to the four rules of that Declaration.⁷⁶ The action of Spain and the United States afforded striking evidence in support of the legal character of those famous rules.

The important cases in American prize courts arising out of this war involved the question of blockade.⁷⁷ The case of the *Carlos F. Roses* involved the determination of the enemy or neutral character of the cargo of a Spanish vessel, the court basing its decision upon the President's proclamation.⁷⁸ In the case of the Spanish steamer *Rita*, condemned as enemy property, the court referred to the efforts of the American Government toward a milder treatment of privately owned ships and cargoes.⁷⁹

Article IV of the President's proclamation already cited extended to Spanish vessels in American ports a thirty day period for loading and departing, and guaranteed immunity from capture if such ships were able to furnish the proper papers. The Spanish decree afforded but five days and did not specify for safety from capture of vessels leaving within that time and met on the high seas. And whereas this Government guaranteed immunity to Spanish merchant vessels which, prior to April 21, 1898, had sailed from any foreign port bound for any port or place in the United States, the immunity to operate not only while such vessels were proceeding toward and discharging cargo in such port or place, but also while they were proceeding toward any unblockaded port, after leaving the port of discharge, Spain made no mention of similar action toward the vessels of this country.⁸⁰

In his annual message, December, 1898, President McKinley asked for authority "to correspond with the governments of the

⁷⁶ Spain and Mexico definitely adhered to the Declaration of Paris in 1908 and 1909 respectively; see Ch. II of this study.

⁷⁷ Benton, E. J., *International Law and Diplomacy of the Spanish-American War* (Baltimore, 1908), p. 178, notes that three Spanish merchantmen were destroyed by a cruiser of the United States, but that the destruction was justified by the authorities on the grounds that the ships were transports.

⁷⁸ 177 U. S. 655; Scott, *Cases*, p. 637.

⁷⁹ Moore, *Digest*, VII, p. 470.

⁸⁰ The American proclamation did not provide for the loading of such vessels nor for immunity for Spanish vessels which were proceeding toward neutral ports, having begun their voyages prior to April 21, 1898. See the case of the *Buena Ventura*, 175 U. S. 384.

principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers.”⁸¹ In spite of our rapid conquest of the seas, American commerce had lost heavily through the rise of insurance rates.

“ . . . one well known shipping firm in New York City paid during the brief period of war over sixty thousand dollars in war premiums, and the aggregate amount of such premiums, according to shippers well informed as to the actual facts, far exceeded the value of all the Spanish merchantmen captured by our Navy under the general rules of maritime warfare.”⁸²

As the major portion of the enlarged premiums was paid to foreign firms the President had good foundation for his statement that: “The experience of the last year brings forcibly home to us a sense of the burdens and waste of war.” Congress did not take final action upon resolutions of both houses in the sense urged by the President’s message, but it removed an important obstacle to later freedom of action by abolishing prize money, a step which the Navy did not hinder.⁸³

The attitude of Congress encouraged President McKinley and Secretary Hay to instruct our representatives to the First Hague Conference to lay before that body the claims of the principle of immunity. There, as the subject was not upon the program of the Conference, the efforts of the American delegation headed by Honorable Andrew D. White succeeded only to the extent that the Conference listened to the memorial and expressed the wish that the question be referred to a subsequent Conference for consideration.⁸⁴

In 1903 President Roosevelt in his annual message advocated the immunity of non-offending private property at sea as a measure necessary to bring maritime warfare to the standard

⁸¹ *Senate Journal*, 55th Congress, 3rd Session, p. 4 ff.

⁸² Butler, C. H., “Freedom from Capture of Private Property at Sea” in *N. A. R.*, 168, 1899, p. 55.

⁸³ *United States Statutes at Large*, 55th Congress, 30, c. 413, p. 1007.

⁸⁴ *Foreign Relations*, 1899, pp. 511-520; Scott, J. B., *Hague Peace Conferences* (Baltimore, 1909), I, pp. 65, 699-700; II, pp. 9, 24, 71, 79; *La Conférence Internationale de la Paix* (The Hague, 1899), pt. I, pp. 31-33.

of humanity practiced in war on land. Congress accordingly, by resolution, declared it to be

"desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."⁸⁵

At the Second Hague Conference this Government crowned its continuous record of agitation for immunity by instructing its delegates to submit the question to the Conference.⁸⁶ The Russian program of April 12, 1906 included the subject.⁸⁷ The consideration of the reform was initiated on June 28, 1907 by an address of Mr. Joseph H. Choate in which the record of international theory and practice in the preceding century was outlined and discussed.⁸⁸ The proposition of the United States, the most sweeping of the ten offered to the Conference, was:

"The private property of all citizens or subjects of the Signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said Signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers".

The delegations of Austria-Hungary, Brazil, China, Italy, Norway, and Sweden expressed adherence to the American proposal. Those of Germany, Portugal, and Russia expressed the desire to see a concurrent determination of the questions of contraband and blockade. Great Britain's delegates declined to consider immunity unless a general agreement to respect private property would lead to a reduction of armaments. Argentina and Colombia desired to see capture maintained. When the vote was taken, eleven states of the forty-four did not respond,

⁸⁵ *Congressional Record*, 58th Cong., 2nd Sess., Apr. 28, 1904, p. 58.

⁸⁶ Scott, *H. P. C.*, II, pp. 192-194.

⁸⁷ *Ibid.*, pp. 176-177.

⁸⁸ *La deuxième conférence internationale de la paix* (The Hague, 1907), *Actes et Documents*, III, pp. 766-779.

twenty-one declared for and eleven against the proposition, while one state abstained from voting. The Commission, therefore, was unable to present it as a convention for the consideration of the Conference.⁸⁹

The record of fact is distinctly creditable to the United States. Compelled by circumstances beyond its control to act upon the ancient rules of prize, it has stood alone amongst governments in making it a feature of its policy in all the changing conditions of its commercial and naval power to urge upon other states the complete exemption of private property at sea from capture, always excepting cases of contraband and blockade. It has taken a leading part in the development of the law of capture to its present status and has consistently evidenced its desire to initiate what appears to it the logical consequence of the steps so far taken.

⁸⁹ *Ibid.*, I, pp. 245-250.

CHAPTER IV

THE THEORY OF IMMUNITY

The literature of international law is rich in exposition and argument upon the subject of respect for private property at sea. As Boeck has written :

“On le voit donc: le temps est dès longtemps passé où quelques voix timides et isolées s'élevaient en faveur de l'inviolabilité de la propriété privée sur mer. Les partisans de cette grande cause, qui semble maintenant gagnée, s'appellent aujourd'hui légion; leur opinion est devenue l'opinion générale et presque universelle”.¹

As there is needed a foundation for a proper understanding of the attitudes which have been and are being taken by the important states toward this question, it will be useful to distinguish the main lines of opinion that have been developed by publicists, commercial bodies, and statesmen, and to examine the proposals that have been put forward upon the basis of such opinions.

A. THE THEORY AND ITS HISTORY

1. INTRODUCTION

Not until the middle of the eighteenth century was a voice raised in support of the principle of immunity. Previous writers had been content to state the law with varying degrees of strictness but with substantial agreement upon the central issue. Albericus Gentilis contended that the captor should be liable for the freight due to the neutral carrier from the enemy shipper.² Grotius admitted the propriety of the confiscation of

¹ Boeck, p. 514.

² *Hispanicarum Advocationis*, 2nd ed. (Amsterdam, 1661), I, c. 28.

neutral ships carrying enemy goods on condition that the captain or owner of the ships was cognizant of the fact that they were enemy property. But he maintained the rule of the *Consolato* as to freedom of neutral goods in an enemy ship.³ His agreement with the attitude of the times is illustrated by his quotation from Cicero: "Neque est contra naturam spoliare eum, si possis, quem honestum est necare."⁴ With Grotius may be ranged his followers, Zouch,⁵ Loecenius,⁶ and Pufendorf,⁷ all basing an adherence to the main doctrines of the *Consolato del Mare* upon a belief in their equitable character. Molloy⁸ and Heineccius,⁹ writing in 1682 and 1721 respectively, agree with the earlier publicists. Bynkershoek phrases his interpretation of the law succinctly: "Cape, sipotes, quodeunque est hostis tui, sed mihi redde quod meum est, quia amicus tuus sum, et impositione rerum mearum nihil sum molitus in necem tuam;" and as regards enemy property: "quid, inquires, dubitatis, cum recte occupem, quicquid hostium est?"¹⁰ Bynkershoek held the matter of the knowledge of the neutral owner or captain that he was carrying enemy goods to be foreign to the legal question.¹¹ Finally, he justifies the capture of enemy property on the ship of a neutral as a logical following out of the right of stoppage. If the latter was legal, and to his mind it was legal, there remained no ground for asserting that to take the goods of an

³ Kleen, *Lois et usages de la neutralité*, II, p. 169.

⁴ *De Jure Praedae Commentarius* (1604), c. IV, p. 45; quoted by Boeck, pp. 398-399. Grotius retains the same doctrines in his main work, *De Jure Belli et Pacis* (Whewell's edition, Cambridge, 1853) III, c. I, note E and c. VI, sec. 6. For refutation of the arguments upon which Grotius rests his opinions see Bluntschli, *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (1878), pp. 103-111; also in *R. D. I.*, X, (1878) p. 60 ff.

⁵ *Juris et Judicii Feccialis* (1650), edited by T. E. Holland, (Washington, 1911), II, p. 39.

⁶ *De Jure Maritimo et Navali* (1651) II, c. 4, sec. 11; cited by Manning, p. 286.

⁷ *Of the Law of Nature and Nations* (Engl. Tr. Oxford, 1710), IV, 4, sec. 14; VIII, 6.

⁸ *De Jure Maritimo et Navali* (1682) I, c. 1, sec. 18; cited by Manning, p. 287.

⁹ *De Navibus ob Vecturam Vectitarum Mercium Commissis*, (1721), c. 11, sec. 9; cited by Manning, p. 288.

¹⁰ *Quaestionum Juris Publici Libri Duo* (Leyden, 1737) I, c. 13.

¹¹ Kleen, II, p. 169, n. 2.

enemy from the ship of a friend was to offer unjustifiable violence to the ship.¹²

"This judgment of Bynkershoek, besides its own intrinsic value is remarkable from the manner in which he anticipates the exact objections made by some of the modern claimants for additional privileges to neutrals. To their demand that a ship should be considered as part of the State to which she belongs, he replies in a manner that makes it surprising that such a fallacy should have been reasserted after such a refutation."¹³

The German writer Wolf published in 1749 a work entitled *Jus Gentium Methodo Scientifica Pertractatum*¹⁴ in which an argument was directed toward the limitation of booty but no objection was uttered against capture.

The relevant facts and the law of the famous Silesian Loan Controversy have been sufficiently outlined in the first chapter of this discussion. Its interest lies in the claim put forward by the Prussian memorialists as a matter of legal right, namely, that the neutral flag saved the enemy cargo, not contraband, from confiscation. This claim was made at a time when both strict legalists such as Bynkershoek, and moralists like Heineccius were asserting that by the law of nations the capture of enemy goods in neutral ships could not be attacked. The document of Prussia was defective in its statement of law and fact. The declaration that a right to any trade entailed a right to all trade is unlikely ever to square with practice; the proposition that a neutral ship was neutral territory had already been proved unsound; the statement that no treaty had ever been

¹² *Quaestionum*, I, c. 14; see Manning, pp. 290-291. Bynkershoek contended that if an examination of the ship's papers revealed the presence of enemy property, such property might be captured.

¹³ Manning, p. 291. The same author also stresses the assertion that Bynkershoek, "a Dutch jurist, writing in Holland, president of the senate of Holland, and in the height of his reputation", replied to the contentions and against the interests of his own countrymen that the treaties containing new rules of prize formed not the law but the exceptions to it. Kleen, p. 170, says of the arguments of Bynkershoek regarding the territorial character of a merchant ship: "Par ces mots, Bynkershoek a encouragé le système, suivi après lui par les partisans de la Règle du Consulat, d'excuser une violation par une autre violation: celle de la souveraineté du pavillon".

¹⁴ Manning says, p. 39: "Wolf is now principally known through the means of his disciple and abridger, Vattel". And see Westlake, II, p. 129.

concluded between maritime powers which contained the principles maintained by the British reply was inexact. The memorial was significant in that it voiced not law but the interest of neutrals; that the memorialists considered the treaties by which the flag covered the cargo as of sufficient number and weight to warrant a demand of right.¹⁵

Vattel, in 1758, sustained the rules of the *Consolato*.¹⁶ As regarded neutral goods damaged or detained through the capture of an enemy ship, no damages should be paid because "the loss sustained by the neutrals on this occasion is an accident to which they exposed themselves by embarking their property in an enemy's ship", an argument which has been extended in order to justify the destruction of neutral goods carried in an enemy ship provided the ship itself be legally destroyed.

Moser agreed with the interpretation of the common law of the sea which confiscated enemy goods upon neutral vessels but, in view of the actual confusion of practice regarding neutral goods on enemy vessels, he was unable to give his authority either to their capture or their immunity.¹⁷

With the publication in 1759 at the Hague of Hübner's *De la Saisie des Bâtimens Neutres, etc.*, the first noteworthy protest was raised against the confiscation of enemy goods on neutral ships. While regarding search as an unquestionable right, he argued that neutral ships, being part of neutral territory, were competent to protect enemy goods not contraband, neutral owners of transports not being parties to the contest. Hübner was not attacking the principle of the right of stoppage but was restricting its application to the discovery of contraband. He was attacking the idea that neutral shipmasters or owners were guilty of an attempt to assist the belligerent whose goods they carried and was attempting to replace it with another to the effect that a neutral had a right to carry goods to an enemy provided he did not carry contraband. Hübner's argument is confused by his use of the analogy between a neutral ship and

¹⁵ For the British viewpoint see Manning, pp. 292-298.

¹⁶ *The Law of Nations*, edited by Chitty, J., (Philadelphia, 1883), III, c. 7, secs. 115, 116.

¹⁷ *Versuch des neuesten europäischen Völkerrechts etc.* (1780) XX, c. 2, secs. 33-34; cited by Manning, pp. 307-308.

neutral territory. His main thesis, however, is sustainable on the ground of neutral right, always provided the facts warrant regarding the right as established, a situation which assuredly had not been developed by 1759.¹⁸

In the same year Lord Liverpool's *Discourse on the Conduct of Great Britain in Respect to Neutral Powers during the Present War* furnished an adequate reply to Hübner's attempt to wipe out previous theory and practice. Basing his work upon Grotius and Bynkershoek, Jenkinson argued, upon the evidence in the use of the right of search, that the dominion of nations does not extend over the ocean, and drew the conclusion that neutral ships had no capacity to protect enemy goods.

Lampredi admitted the desirability of a general agreement upon the inviolability of the neutral flag but, recognizing the improbability of the reform being accomplished, and believing that the neutral suffers only in small degree, since he gets his freight, he preferred to advocate that the rule of capture be maintained. Lampredi's position was somewhat equivocal since he held that free enemy goods would mean the prolonging of war.¹⁹ He draws from Kleen this question: "Pourquoi la désirer, si comme le pretend Lampredi, l'application en ferait retomber sur les neutres la responsabilité de la prolongation de la guerre et de son effusion de sang?"²⁰ Lampredi regarded the legality and justice of the capture of enemy goods as beyond question and strongly repudiated Hübner's argument as to territoriality. His argument in its entirety shows the influence of his knowledge of past general theory and practice in conflict with a natural bias toward greater freedom for the commerce of his own small, normally neutral country.

G. F. de Martens, whose *Droit des gens* appeared first in 1788, and Klüber, writing under the same title in 1819, followed Hübner in resting their opposition to the capture of enemy

¹⁸ *Passim*; see Manning, pp. 299-305.

¹⁹ *Del Commercio dei Popoli Neutrali in Tempo di Guerra* (1788) c. X, XI; cited by Phillimore, R., *International Law* (Philadelphia, 1857) III, p. 246.

²⁰ Kleen, II. p. 171.

property on neutral ships upon the territorial analogy.²¹ Kent simply stated the practice of American courts to be based upon the recognition of the legality of the English rule.²²

The eighteenth century thus had witnessed the struggle between the advocates and the opponents of the *Consolato* rule. The principle consecrated at Utrecht that "free ships" should make "free goods" had received energetic if not widespread partisanship. It had been incorporated as the principal plank in the platforms of the Armed Neutralities of 1780 and 1800. Although not advanced to effectual standing in the law of nations until 1856, in the minds of European theorists the principle that the flag covers the goods was established much earlier. "Après l'époque de la Neutralité armée, ce ne sont guère, en Europe, que des publicistes anglais, qui ont tâché de légitimer la Règle du *Consulat*."²³ The succeeding century developed the arguments for and against complete immunity. Though writers up to the Declaration of Paris took incidental occasion to support the new as opposed to the old rule, their principal concern lay with the justice and expediency of the wider reform which constitutes the present subject. The first attempt to evaluate immunity and to present the question in such form as to induce further consideration of it was made by the Abbé de Mably in his *Droit public de l'Europe fondé sur les traités*.²⁴ This work first published in 1748, directed its main attack against the practice of privateering, which in the circumstances of the times was equivalent to a protest against capture as such. It was asserted that the interdiction of enemy commerce reacted seriously upon the home country. The practice of private capture was con-

²¹ De Martens, G. F., *Précis du droit des gens* (New edition, Paris, 1831), II, pp. 261-262; Klüber, J. L., *Droit des gens* (New edition, Paris, 1861), pp. 331-404.

Martens in his *Essai concernant les armateurs, les prises, et surtout les reprises* characterizes the practice of depriving enemy subjects of their ships and cargoes as barbarous, c. 1, sec. 6, pp. 37-38; quoted by Boeck, p. 412.

²² *Commentaries*, I, p. 136.

²³ Kleen, II, p. 171.

²⁴ Mably, l'Abbé de, *Collection complete des oeuvres* (Paris, 1794-5); the work cited above forms Vol. VI of this collection.

demned in words which have since been frequently used against capture by public ships:

“Nous regarderions avec horreur une armée qui ferait la guerre aux citoyens et les dépouillerait de leurs biens; ce serait violer le droit des gens et toutes les lois de l’humanité. Or, je demande comment ce qui serait infâme sur terre peut devenir honnête ou du moins permis sur mer?”

The maintenance of capture as a right was contrary to the advantage of England, as it was to that of any commercial nation in proportion to the extent of its foreign trade. England’s navy had not prevented, in the wars of the seventeenth and eighteenth centuries, the price of insurance from rising as much in England as in France; and English insurance companies had suffered from the activity of English captors, public and private.²⁵

Galiani went further, demanding freedom of merchant vessels from attack by public armed vessels, always, of course, admitting the legality of seizing contraband.²⁶ Azuni, while upholding privateering as a political weapon, maintained that no merchant vessels should be seized unless carrying contraband.²⁷

Rousseau incorporated the basic idea of Mably in words which became the common recourse of nearly all proponents of immunity:

“War, then, is not a relation between man and man, but a relation between State and State, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. In short, each state can have as enemies only other states and not individual men, inasmuch as it is impossible to fix any true relation between things of different kinds”.²⁸

Napoleon has left on record ideas strangely in contrast with the regulations of the decrees used against his island enemy:

²⁵ Ed. of 1794-5, pp. 513-558.

²⁶ *De' Doveri de' Principe Neutrali Verso i Principi Guerregianti, e di Questì Verso i Neutrali* (1782), I, c. 10, pp. 429-438.

²⁷ *Sistema universale dei principii del diritto maritimo dell' Europa* (1796) Ed. of 1805, II, p. 238; see Boeck, p. 411.

²⁸ Rousseau, Jean J., *The Social Contract*, Tr. by H. J. Tozer (London, 1902), p. 106.

"Les mers n'appartiennent à aucune nation: elles sont le bien commun de tous les peuples et leur commun ressource. Les bâtimens de commerce ennemis appartenant à des particuliers devront être respectés".²⁹ And later: "Le commerce se ferait alors sur mer entre les nations belligérantes, comme il se fait sur terre au milieu des batailles que se livrent les armées".³⁰

Boeck leads one to infer that Napoleon's sentiments may have solid basis in the quotation from Cauchy to the effect that the continental blockade, though affecting in a small way the commercial fortunes of England, did not interrupt the general mass of English commerce and that upon the establishment of peace, English commerce had exceeded all previous proportions.³¹

In the era of the Napoleonic hegemony two great jurists presided over the destinies of prizes in the English Court of Admiralty and in the French Conseil des Prises. Sir William Scott thus tersely expressed his attitude toward capture: "Enemies' cargoes are seizable at sea, whatever the ships, whatever the cargoes, and whatever the destination." Portalis, government commissary at the French prize court, while forced to regulate his advice in accordance with the public ordinances, held opinions conformable to the manifestoes of the Armed Neutralities. He expressed his own views at the installation of the Conseil des Prises (14 Floreal, An. VIII), so closely following Rousseau as to have been counted by many subsequent writers the originator of the doctrine that war should affect directly only the combatant population and the state which it represented in arms.³² Portalis understood that war necessarily brought injury to the individual members of a state. But he argued that as those not actively participating had no direct share in carrying on operations, they were legally entitled to have their private property respected. His chief reliance was the evidence which the rule of respect for private property in land warfare afforded toward proving that that principle had become a rule of law, and he sought to prove that, since such a rule existed in land warfare, it must exist in all kinds and conditions of warfare between

²⁹ *Letter to Armstrong*, Aug. 22, 1809, quoted by Boeck, p. 89.

³⁰ *Memoires*, III, p. 301, see Boeck, p. 90.

³¹ Boeck, p. 90.

³² Boeck, pp. 413-414.

civilized states. This thesis runs as the central thread throughout the opinions of the partisans of immunity, appearing so continuously in writer after writer as to lead the student to accept it by reason of sheer force of the authority behind it.

The great majority of continental publicists, including the French, German, and Italian³³ schools have accepted the advisability of immunity and have bent their efforts toward convincing the English writers, who have as a rule had the support of American theorists. The weight of expert opinion has increased steadily throughout the past century and has had some effect upon the hitherto impenetrable defences maintained by English thinkers.³⁴ The bare mention of the eminent names which go to make up the list of those who desired and those who now desire greater freedom for commerce demonstrates the strength of the movement. Where noteworthy addition has been made to the argument it will be useful to observe its trend.

2. Italian Opinion

Romagnosi,³⁵ Lucchesi-Palli,³⁶ Mancini,³⁷ Vidari,³⁸ P. Fiore,³⁹ A. Pierantoni,⁴⁰ Casanova,⁴¹ Brusa,⁴² Pertile,⁴³ Paternostro,⁴⁴

³³ Pierantoni, A., "Les prises maritimes, d'après l'école italienne" in *R. D. I.*, VII (1875), pp. 619-656.

³⁴ The remarkable monograph of M. Charles de Boeck is indispensable to the study of 19th century writers up to 1882, and the writer has accepted his estimate of such works as have not been immediately available.

³⁵ *Questioni di diritto sulle prede marittime* (1834); see Boeck, p. 417.

³⁶ Transl., *Principes de droit public maritime* (1812); see Boeck, p. 418.

³⁷ *Prelezioni*, (1873), pp. 113-114, see Boeck, p. 423.

³⁸ *Del rispetto della proprietà privata fra gli stati in guerra* (1865); see Boeck, pp. 452-455. Also "Navires ennemis et marchandises ennemies" in *R. D. I.*, III, 1871, pp. 268-287.

³⁹ *Il diritto internazionale codificato* (Turin, 1909), pp. 601-611; *Trattato di diritto internazionale pubblico*, (Turin, 1891), III, pp. 195-218.

⁴⁰ "Les Prises, etc.", in *R. D. I.* (1875), VII, pp. 619-656.

⁴¹ *Del diritto internazionale*, 3rd ed. (1876), II, pp. 152-156; see Boeck, p. 456.

⁴² *Ibid.*, Annotated, I, CXVI, ff; II, pp. 163-174; see Boeck, p. 456.

⁴³ *Elementi di diritto internazionale moderne* (1877), I, pp. 294-299; see Boeck, p. 456.

⁴⁴ Transl., *Prises, reprises et judgments qui y sont relatifs*. Originally published at Naples (1879); see Boeck, pp. 457-458.

Amari,⁴⁵ and Silveti,⁴⁶ all of whom demand respect for private property, may be cited as typical representatives of the Italian school. The argument of Vidari is most elaborate. The citizen, he says, delegates a part of his activity to the common fund of the state, retaining liberty of disposal over the remainder. He admits that war calls legitimately upon the citizen to sacrifice his own interests in so far as necessary for the good of the state, that necessity being measured by the portion of his activity which he has delegated to the state. War, being a relation of state to state, should be carried on by means of the public forces of each state. The private citizen should experience the direct effects of war only in so far as he participates in the military operations. Any damage to property suffered by him should be indirect. Justice demands that the same principle be applied on sea as on land. Differences in conditions may call for differences in the application of the principle but they do not alter the principle itself. Ships on the high seas are under the sovereignty of the state whose flag they fly. Thus the legal relationships which are produced upon these ships are of the same sort as the legal relationships which are produced on land.

Fiore declared that the abolition of capture would not prolong wars; that there was no justice in attempting to enforce one law on land, another at sea; that capture could not be justified on the theory of contributions. While maintaining the principle of immunity, Fiore urged it particularly on practical grounds.

Tullio Giordana in his recent monograph, also dealing with the question mainly from the standpoint of policy, arrives at the opposite conclusion. To him: "E assolutamente impossibile separare l'individuo dallo stato"; private property is not respected in warfare on land; the legal foundation of capture is the right which a belligerent has of temporarily occupying the sea by excluding his enemy under penalty of the confiscation of his ships and cargoes; the moral effect of capture is important: "Ma anche ridotto a fornir episodi di secondaria im-

⁴⁵ *Del rispetto della proprietà privata nelle guerre marittime* archivio giuridico (1898). I; see H. Bonfils, *Manuel de droit international public*, 4th ed., edited by P. Fauchille (Paris, 1905), pp. 710-711.

⁴⁶ *La proprietà privata nemica sul mare dev esser inviolabile* (1901); see Bonfils, pp. 710-711.

portanza alla storia di guerra, il mezzo che noi sosteniamo contribuirebbe sempre a preparare quello stato psicologico che induce un popolo alla pace". Giordana finally expresses his opinion as favorable to the political convenience of capture to Great Britain, Germany, France, the United States, and Italy.⁴⁷

3. German Opinion

The German school in the nineteenth and in the present century has not so unanimously maintained the demand for the inviolability of private property in warfare at sea. Publicists of such weight as Schwebemeyer,⁴⁸ Röpeke,⁴⁹ von Maltzahn,⁵⁰ Ph. Zorn,⁵¹ W. Hamman,⁵² T. Niemeyer,⁵³ and Oppenheim,⁵⁴ oppose the abolition of the rule of capture. Perels is counted by Oppenheim as amongst the opponents, although Bonfils has placed his name in his list of partisans.⁵⁵ And Hans E. Posse con-

⁴⁷ *La proprietà privata nelle guerre marittime* (Turin, 1907) pp. 60, 67, 80, 88, 90-92.

⁴⁸ *Das Privateigentum zur See im Kriege* (Berlin, 1860); see Posse, H. E., *Das Seebeuterecht, Zeitschrift für Internationales Recht*, 21, 1911, p. 175.

⁴⁹ *Das Seebeuterecht* (Leipzig, 1904), pp. 36-47; see Posse, p. 174.

⁵⁰ "Der Seekrieg," in *Deutsche Rundschau*, 121, 1904, p. 105.

⁵¹ "England und die neuere Entwicklung des Völkerrechts," in *Deutsche Juristen-Zeitung*, Oct., 1906, p. 1051; see Posse, p. 175.

⁵² *Der Streit um das Seebeuterecht* (Berlin, 1907) pp. 31-32.

⁵³ *Prinzipien des Seekriegsrechtes* (Berlin, 1909); see Posse, p. 174.

⁵⁴ *International Law*, II, p. 223.

⁵⁵ *Das internationale öffentliche Seerecht der Gegenwart* (Berlin, 1903), pp. 194-198. Oppenheim considers Perels one of an increasing number of continental publicists "who oppose the abolition of the once so much objected to practice of capturing enemy merchantmen", II, p. 223, n. 1. Posse agrees with Bonfils in regarding Perels as a partisan of abolition. Perels' discussion of the movement for the abolition of booty-right at sea is largely taken up with the history of the question. It appears, however, that he is opposed to capture but sees no early prospects of its abolition. On page 194 Perels says: "Seebeuterecht und Kaperei decken sich im allgemeinen in ihren Wirkungen. Gegenstand beider ist das feindliche Privateigentum auf dem Meere; beider Ziel dessen Wegnahme und überhaupt der Ruin des feindlichen Seehandels, wobei jedoch häufig, bei der Kaperei stets die Erzielung eines Gewinnes auf seiten der Kaptoren (Nehmeschiffe) in dem Masse in den Vordergrund tritt, dass beides, Ausübung der Kaperei und Ausübung des Seebeuterechts durch Kriegsschiffe, vielfach als ein System privilegierten Raubes bezeichnet worden ist". His views as to the prospect of abolition are to be found on pages 196 and 198: "Nach Lage der Verhältnisse ist auf eine Beseitigung des Seebeuterechts in absehbarer Zeit nicht zu rechnen"; and: "Es ist daher nicht erfindlich, wie Leroy im Hinblick auf dieses Ergebnis die Prognose stellen kann: 'Il n'est donc pas douteux dans un jour très prochain la prise de la propriété privée ennemie sur mer sera rayée du Code des nations'".

cludes his detailed study, *Das Seebeuterecht*, with this discouraging sentence: "Dies Ergebnis erhärtet die Anschauung, dass die beste Kriegsversicherung für jeden Staat die eigene Stärke bildet."⁵⁶

On the other hand, the majority of German publicists have supported inviolability. Heffter wished to substitute sequestration for capture, since it appeared to him chimerical to demand the more extensive reform.⁵⁷ Zachariae,⁵⁸ Berner,⁵⁹ Kaltenborn,⁶⁰ Dr. Aegidi,⁶¹ Holtzendorff,⁶² Gessner,⁶³ Bluntschli,⁶⁴ Bulmerincq,⁶⁵ Tecklenburg,⁶⁶ Geffcken,⁶⁷ and Wehberg⁶⁸ have expressed themselves without ambiguity as partisans of inviolability. Attlmayr of Austria declared that the Declaration of Paris had left weak states in a still more dangerous position than they had formerly occupied and that it was to the interest of his country that immunity should become a legal principle.⁶⁹ Zachariae's central thesis was that of Rousseau: According to public law war is simply a relation between governments; "Die unterthanen des feindlichen Staates sind nicht deswegen, weil sie *de jure* als Feinde betrachtet werden können, sondern nur,

⁵⁶ Posse, p. 377.

⁵⁷ *Das europäische Völkerrecht*, 8th ed., edited by H. Geffcken (Berlin 1888), pp. 297-307.

⁵⁸ *Vierzig Bücher vom Staate*, IV, Abth. 1, 2; see Boeck, p. 419.

⁵⁹ Beute, in *Deutsches Staats-Wörterbuch* (Bluntschli, 1857), II, pp. 115-118; cited by Boeck, p. 431.

⁶⁰ Article in same publication (1865), pp. 375-385; cited by Boeck, p. 432.

⁶¹ *Frei Schiff unter Feindes Flagge* (Hamburg, 1866); cited by Boeck, p. 469.

⁶² *Encyclopedie der Rechtswissenschaft* (2nd ed., 1876). *Prisengerichte*, p. 367; see Boeck, p. 470.

⁶³ *Das recht des neutralen Seehandels* (Bremen, 1855); see Posse, p. 125.

"De la reforme du droit maritime de la guerre" in *R. D. I.*, (1875), pp. 236-255.

Le droit des neutres sur mer. (2nd ed., Berlin, 1876). pp. 1-82; 246-294; *Kriegführende und neutrale Mächte*, (1877); see Boeck, pp. 473-474.

⁶⁴ *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (Nordlingen, 1878); Translated into French and published in *R. D. I.* IX, (1877), pp. 508-557 and X, (1878), pp. 60-82.

⁶⁵ *Das Völkerrecht* (1887); see Bonfils, p. 718.

⁶⁶ *Die Freiheit des Meeres* (Bremen, 1870); cited by Posse, p. 173.

⁶⁷ Annotation of Heffter, *cit. infra*; also in Holtzendorff, *Handbuch des Völkerrechts* (Hamburg, 1889) IV, pp. 597-601.

⁶⁸ *Capture in War on Land and Sea*, (London, 1911).

⁶⁹ *Die Elemente des Internationalen Rechts* (1872), I, pp. 52-65; see Boeck, pp. 467-468.

wenn und in wie fern sie *de facto* Feinde sind, feindselig zu behandeln." L. Neumann, the Austrian publicist, condemns the law of maritime capture as barbarous and contradictory of itself: "il ne frappe que la chose ou la marchandise sur flot, non celle qui est déjà déchargée ou qui n'est pas encore chargée."⁷⁰

Gessner was willing to admit the absolute necessity of the capture of the crews of merchant vessels but considered that sequestration should replace confiscation of private enemy ships and cargoes. If private property were made immune from capture, it would be necessary to admit preëmption. Necessities would always have to be observed in warfare but real and imaginary necessities were always to be distinguished. Gessner was optimistic as to the prospect for the principle of inviolability. He was especially a critic of Great Britain upon whom he placed the responsibility for a state of law by which "les guerres maritimes de celle époque [since 1750] conservèrent, en règle générale, même vis-a-vis des neutres, le caractère spoliateur du moyen-âge." He declared that British parliamentary debates had maintained the repetition of eighteenth century principles, but that, England's maritime predominance being now much less certain or entirely lost, she should reconsider her formerly justifiable position as defender of the rules of capture.⁷¹

Bluntschli has expressed the theoretical concept of the relationship between war and individual in the manner of Vidari:

"Chaque individu se trouve dans une double position; d'un côté, il vit pour lui seul, il est une personne privée; comme tel, il a un grand nombre de droits quant à sa personne, quant à sa famille, à sa fortune; il a des droits privés. Comme la guerre ne se fait pas entre les simples citoyens, elle n'a point pour conséquence l'extinction des droits privés, et ces derniers ne peuvent jamais dépendre du bon plaisir de l'ennemi.

"De l'autre côté, chaque individu est citoyen d'un état; en cette qualité, il est intéressé à la lutte que soutient son pays. Le sort de sa patrie ne saurait lui être indifférent. Il prend sa part des succès ou des revers de l'état auquel il appartient. Son devoir comme citoyen

⁷⁰ *Droit des gens modern*. Translated from the third German edition (Paris, 1886), pp. 194-195.

⁷¹ "De la réforme du droit maritime de la guerre" in *R. D. I.*, VII, (1875), p. 256, ff.

est de donner ses biens et sa vie pour la patrie en danger. Sur le terrain du droit public, tous les citoyens sont tenus à de nombreuses prestations envers l'état".

From these considerations Bluntschli declares that modern international law makes this distinction:

"En tant que simples particuliers, les individus ne sont pas ennemis. En tant que citoyens d'un état donné, ils participent à l'inimitié des états auxquels ils appartiennent. Pour tout ce qui concerne les droits privés, c'est le pied de paix et les droits admis en temps de paix qui font règle. Dès que le droit public est en cause, le pied de guerre commence, et les lois de la guerre entrent en vigueur."⁷²

Bluntschli admits that those persons "qui prennent à la conduite de la guerre une part active, en soutenant les troupes les armes à la main ou en rendant des services personnels à l'une des parties belligérantes, sont placées par contre dans une tout autre position", that is than that of "simples particuliers".

He rejected the defence of certain writers to the effect that the capture of private property at sea could not be assimilated to seizure of such property in continental warfare because in the latter it was possible to take possession of a portion of territory and to obtain thereby "un moyen puissant de contraindre l'état avec lequel elles sont en guerre à reconnaître leurs prétentions", whereas "les puissances maritimes . . . n'avaient pas ce moyen, parceque leur force se restreint à la mer et aux côtes". He denied that this handicap should be regarded as justifying "les puissances maritimes de se pourvoir d'un autre moyen de contrainte" when that "other means" was that "d'anéantir le commerce maritime et de s'emparer des navires ou marchandises de l'ennemi". The use of such a means of warfare was not justified because: "l'insuffisance des moyens légitimes de faire la guerre, ne peut jamais justifier l'emploi des moyens illégitimes . . . On reconnaîtra que c'est une tache pour notre civilisation, que d'admettre le droit de saisir les biens des particuliers, sous prétexte qu'on est en guerre maritime avec l'état dont ceux ci sont ressortissants"⁷³

⁷² *Le droit international codifié*, 2nd ed. (Paris, 1874), p. 33.

⁷³ Bluntschli, p. 42.

Bluntschli found hope of reform in the change of attitude on the part of civilized nations toward private enemy persons: "Les nations civilisées ont aujourd'hui conscience que l'humanité constitue une communauté, non-seulement naturelle et morale, mais juridique, à laquelle aucun peuple, aucun Etat ne peut se soustraire".⁷⁴

Geffcken viewed the problem in the light of recent history. The Franco-Prussian war had demonstrated that the importance of the right to confiscate private property at sea had been exaggerated. When war broke out those interested had notified vessels by cable to remain in neutral ports with the result that the French fleet made but few captures. He believed that the merchant marine of an enemy would furnish many more sailors to his navy if forced to lie idle than if permitted to continue its natural activity. To suppress the capture of merchant ships would be to shorten wars, because the navy would be able to center all its efforts upon the annihilation of the enemy navy.⁷⁵

Wehberg accepts the doctrine that war is a relationship which can exist only between states. But he does not deduce the same consequences of that doctrine as did certain of the earlier writers.

"Since reasons of war must form the guiding principles at sea as well as on land, it may very easily be that sea warfare requires quite different measures. Although the permanent retention of private property at sea can in no way be justified, a reference to the regulations for land warfare by no means refutes the right of temporary seizure at sea . . . Rather the question arises whether military necessity at sea does not demand at least a temporary embargo on the enemy's private property. It will, however, be shown later that prize at sea can by no means be justified by necessities of war, and thus all defence of that right is proved to be unfounded".⁷⁶

Wehberg attacks the position of Hamman in which the latter gave his opinion as being: (1) that on land the enemy state can,

⁷⁴ *R. D. I.*, (1877), p. 509.

⁷⁵ Geffcken declared the Declaration of Paris unjust as throwing the trade of the belligerents into the hands of the nations that are not endangered; see von Holtzendorff, F., *Handbuch*, IV, p. 597 ff. On p. 601 he says: "Der nächste grosse Krieg wird England unfehlbar die bittere Erfahrung bringen, dass es durch seinen widerstand gegen diese Reform gegen sein eigenstes Interesse gehandelt hat."

⁷⁶ Wehberg, p. 20.

“by virtue of the power acquired, prevent hostile use of private property as a matter of course”, and (2) “that in land warfare private property is bound to the soil, and cannot be rescued from the invading foe, while in naval warfare . . . merchandise may be exposed to the risks of war without natural hindrance”. In reply to the first proposition Wehberg points out that “there is no reason why several patriotic millionaires should not lend their whole fortune to the state” and that “the ready money of individuals on land [is] much more useful than goods afloat at sea which must first be turned into money”. To the second argument he replies that war in accordance with it would mean “that the peaceful inhabitant [would] also have to lose his property in land warfare, if, on the outbreak of war he did not quickly put his fortune out of reach, but kept it by him” and that private property on land is not bound to the soil because any citizen on the outbreak of war could secure his money in the banks of a neutral state.⁷⁷

Wehberg believes that reform will come only when the nations regard themselves as “equally privileged” by it. “Whereas on land this [equality of privilege] was arrived at only at a very late period, primarily by means of the Peace of Westphalia, in naval warfare a generally acknowledged international code could only be evolved much later, because, throughout, some one State held the predominance at sea”.⁷⁸ Spain, the Netherlands, and, today, England, have successively refused to consent to reform.

Speaking of the effect of the second rule of the Declaration of Paris, Wehberg declares that: “If the law of prize was intended to destroy the enemy’s commerce, then the adoption of the maxim, “Free ship, free cargo” was a violation of that principle, or [an] international declaration that this should be the first step towards the abrogation of that ancient right.”⁷⁹ It operated, leaving blockade out of consideration, to insure the maintenance of the imports and exports of belligerents by means of neutral vessels. Wehberg considers that “no serious doubt

⁷⁷ *Ibid.*, pp. 22-23.

⁷⁸ *Ibid.*, p. 23.

⁷⁹ *Ibid.*, pp. 129-130.

can be entertained as to the ability of neutrals to take over the commerce of belligerents".⁸⁰

He points out the impossibility of an effective blockade of all the French or British ports and the consequent unlikelihood of blockade operations rendering ineffective the freedom granted to enemy property under the neutral flag, recognizing, however, that: "Possibly a blockade of the German coasts by England, or several other great maritime powers is conceivable".⁸¹ The development of communications has rendered non-existent the possibility of even an effective blockade starving out the country blockaded. His comment after analyzing the nature of the exports and imports of the principal countries is: "Thus we see that not only the law of prize but of blockade as well is based on obsolete conceptions . . .".⁸² Wehberg discusses the effectiveness of capture in past wars and closes his chapter on the abolition of the law with this commentary:

"One must not therefore [i. e., from the fact that capture has never had a decisive influence] deny to the right of prize all effect in a war at sea. In many cases it will, doubtless, evoke minor subsidiary results. But is such effect so valuable as to justify the grave injury to the world's economy which must necessarily follow in the wake of that right? The question can only be answered in the negative if one sums up the actual effects of the right".⁸³

Oppenheim who should, perhaps, be classed with English publicists, does not discuss the question of principle further than to say that "it is a matter for politicians, not for jurists, to decide whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property may be confiscated."⁸⁴ From the viewpoint of policy "there is no doubt that the abolition of this rule would involve a certain amount of danger to a country like Great Britain whose position and power depend chiefly upon her navy." He stresses on the one hand the importance of being able to annihilate an enemy's commerce, on the other to forestall, through

⁸⁰ *Ibid.*, p. 130.

⁸¹ *Ibid.*, p. 133.

⁸² *Ibid.*, p. 135.

⁸³ *Ibid.*, p. 135.

⁸⁴ *International Law*, II, p. 223.

capture, the transformation of large merchant liners, especially constructed for the purpose, into auxiliary cruisers.⁸⁵ The most striking statement made by Professor Oppenheim is that: "To-day it may perhaps be said that even if Great Britain were to propose the abolition of the rule, it is probable that a greater number of the maritime States would refuse to accede." And he notes a "slow, but constant, increase in the number of continental publicists who oppose the abolition of the one so much objected to practice of capturing enemy merchantmen."⁸⁶

4. French Opinion

A majority of French publicists are partisans of the principle of inviolability, but Ortolan, the greatest opponent of that principle is one of the French minority, and he does not lack for support within his own country. The important works in which opposition to the principle finds expression are those of Ortolan,⁸⁷ Pistoye et Duverdy,⁸⁸ Hautefeuille,⁸⁹ Barboux,⁹⁰ Emile Carron,⁹¹ Admiral Aube,⁹² Funck-Brentano et Sorel,⁹³ Delalande,⁹⁴ Raynaud,⁹⁵ Boidin,⁹⁶ and Dupuis.⁹⁷ This considerable list of eminent authors provides some insight into the continental opposition to the abolition of prize.

Ortolan agreed with his opponents that war should be re-

⁸⁵ *Ibid.* pp. 222-223.

⁸⁶ *Ibid.*, pp. 223-224.

⁸⁷ *Règles internationales et diplomatie de la mer*, 3rd ed., (Paris, 1856), II, pp. 35-60.

⁸⁸ *Traité des prises maritimes* (Paris, 1859), I, pp. 3-18.

⁸⁹ *Des droits et devoirs des nations neutres*, 3rd ed., (Paris, 1868), III, pp. 203-204; *Questions de droit maritime international* (Paris, 1868), pp. 61-109; *Histoire du droit maritime international* (Paris, 1869), *passim*.

⁹⁰ *Jurisprudence du conseil des prises pendant la guerre de 1870-1871* (Paris, 1871), pp. 17-35.

⁹¹ *La course maritime* (1875), pp. 16-30; cited by Boeck, pp. 532-533.

⁹² *Un nouveau droit maritime international* (1875), pp. 15-19.

⁹³ *Precis du droit des gens* (3rd ed. Paris, 1900), pp. 402-404.

⁹⁴ *Des prises maritimes* (1875) pp. 57-106; quoted by Boeck, pp. 533-534.

⁹⁵ *Du principe du droit de prise dans la guerre maritime* (1900); cited by Bonfils, p. 710.

⁹⁶ *Les lois de la guerre et les deux conférences de La Haye* (Paris, 1908), pp. 144-162.

⁹⁷ *Le droit de la guerre maritime d'après les doctrines anglaises* (Paris, 1899), pp. 35-47; *Le droit de la guerre maritime d'après les conférences*, (Paris, 1911), pp. 55-86.

garded as a relation between states and that private property should be interfered with as little as possible. But he recognized that an enemy does not possess at sea the same means of injuring his opponent that he can exercise on land. And he based his objection to abolition mainly upon two grounds, both political: (1) That the mercantile navy is a means of naval power always ready to come to the aid of a belligerent, and (2) that if a weaker power can continue its trade unmolested, the superior naval power of its enemy would prove of no advantage.

Pistoye et Duverdy considered war to concern the belligerents only as states, but they defended prize as a necessary means for the weakening of the enemy and the shortening of war. Here it may be interpolated that by the phrase "relation between states" is meant that only in their "public capacity," i. e., as soldiers, marines, aviators, etc., enlisted in the public armed forces of the state, may individuals take part in military operations and so become liable to have exercised against them the consequences of their public status. But if, by engaging in a trade absolutely necessary to the home state a private individual thus becomes an indirect participant in war, does he not render himself liable, if not to the extreme rigors of war, at least to the loss of his investment and profits? Soldiers are not killed for the sake of killing; so private property is not captured and destroyed except with the object of striking at the resources of the enemy state. Both the soldier and the maritime entrepreneur are, perhaps in different degrees, public agents.

Hautefeuille was, at the same time, an ardent defender of capture and of the rights of neutrals. He believed that inviolability in law would be futile unless contraband, visit and search, and blockade also were abolished.⁹⁸ He declared that there existed no law of land warfare rendering property inviolable; that "the interest of the conqueror [was] always the basis and measure of his moderation."⁹⁹ But his argument tends to show that so different are the persons and property engaged in commerce at sea from those in land trade that, even if he ad-

⁹⁸ *Des droits et devoirs des nations neutres*, III, pp. 203-204.

⁹⁹ *Questions de droit maritime international*, pp. 74-84.

mitted that private property was respected on land, he would still be able to draw conclusions fatal to respect for such property at sea.

Hautefeuille's idea of American policy is interesting if somewhat uncomplimentary: "Dans ce pays, les idées humanitaires sont, tout le monde le sait, subordonnées aux intérêts matériels." In proposing inviolability in 1856 Marey wished: (1) to support the Monroe Doctrine, (2) to relieve the small American navy from the task of protecting a merchant marine which "dépasse, pour le nombre et le tonnage des navires, la marine britannique elle-même."¹⁰⁰

This learned writer said that immunity for enemy property would injure rather than assist neutrals because it would decrease their carrying trade in time of war.¹⁰¹ He appears to have regarded the losses sustained by neutrals who send their goods by enemy vessels as comparatively unimportant and to have underestimated the importance of the facts that in time of war belligerents do not trade with one another and that neutrals would still have the immense carrying trade left free by virtue of belligerent necessity for vessels to transport troops and supplies.

Barboux illustrated the evils of warfare on land by means of the war of 1870-1871. Whereas the French captures at sea were valued at but six million francs, "les ruines subies sur terre par des propriétés privées inviolables dépassent le somme de six cents millions."

Admiral Aube was unable to admit the utility of principles of justice as applied to war: "il dépend de considerations de tout autre ordre, de convenances dont ceux qui sont chargés du succès de la guerre, qui en sont responsables, jugent seuls et en dernier ressort."

Boidin denies emphatically the truth of the maxim that "la guerre est une relation d'Etat à Etat." "Les individus ne peuvent pas être laissés en dehors des hostilités, ils ne peuvent pas être séparés de l'Etat auxquels ils appartiennent Il est vrai de dire seulement que les non combattants et la pro-

¹⁰⁰ *Questions*, pp. 97-106.

¹⁰¹ *Ibid.*, pp. 102-104.

priété privée seront respectés dans la mesure où la guerre le permet.” No one, he urges in reply to Boeck, holds that, without the right of capture, maritime war would be impossible, but that it would be powerless. He refuses to agree with Boeck that the possible utilization of merchant vessels for war purposes is the principle *raison d'être* of the right of capture: “Ce qui forcera l'ennemi à se soumettre, dans la guerre maritime, ce sera la ruine de son commerce et la panique financière qui s'en suivra. Le droit de prise est nécessaire pour obtenir ce résultat.”

Dupuis has made himself a rival of Ortolan in his complete and clear exposition of the realities of the situation. The question of principle does not appear to him important, though he compares the opinions of the continental and the English schools in that regard.

“Il importe d'autant plus d'examiner qui a tort ou raison dans ce débat que de l'utilité ou de l'inutilité de la confiscation dépend, en définitive, sa légitimité ou sa condamnation. War, necessarily brutal, authorizes all violence tending to bring about the submission of the enemy and the reestablishment of a durable peace. If capture has this virtue, it is the more justifiable since, among means of violence, it is certainly not the most barbarous”.¹⁰²

Dupuis believes that the real object of maritime warfare is to deprive the adversary of his use of the sea. The sanction of this prohibition is capture, which disorganizes the economic life of the enemy just as warfare on land disorganizes that life. Against purely continental powers the prohibition is useless, against powers partly maritime it is advantageous, while against purely maritime powers such as England “l'interdiction de l'usage de la mer est la menace la plus dangereuse.” He quotes Wilson upon this point: “The air that they breathe is not more necessary to human beings than is the free and uninterrupted passage of her ships upon the seas to England.”¹⁰³

Examining the question from the viewpoint of the conflict between belligerent and neutral interests Dupuis considers that, since neutrals are rendered by war able, though involuntarily,

¹⁰² *Le droit de la guerre maritime d'après les doctrines anglaises*, p. 41.

¹⁰³ *Ibid.*, p. 46. Quoted from Wilson, H. W., “The Protection of our Commerce in War” in *Nineteenth Century*, 39, February, 1896, p. 219.

to injure a belligerent's cause, they should be willing to endure in patience restrictions upon themselves. They should not expect to see their commerce extend itself at the expense of belligerents, though they rightly could hope that it should not be diminished by a war in which they took no part.¹⁰⁴

Capture at sea was not to be assimilated to pillage on land since "en tous cas, l'occupation du territoire suffit à exercer la contrainte qui détermine à céder" whereas at sea, on the one hand, "the confiscation of ships and cargoes of the enemy may, undoubtedly, cause the ruin of some individuals, but elle ne consume pas, avec la brutalité d'une dévastation systématique, la ruine totale de populations surprises par l'invasion," while on the other hand, "sur mer, où il ne peut être question d'occupation, il n'est que plus nécessaire de sanctionner rigoureusement les infractions à l'interdiction de transport qui peut seule amener le reddition du vaincu."¹⁰⁵

If France has produced the most eminent partisans of prize, considered as a means of warfare in general rather than as the weapon of a particular state, she has also most completely developed the theories upon which inviolability is based. Mably, whose work has already been touched upon,¹⁰⁶ Massé,¹⁰⁷ Leveillé,¹⁰⁸ Pradier-Fodéré,¹⁰⁹ Cauchy,¹¹⁰ Guéronnière,¹¹¹ Desjardins,¹¹² Boeck,¹¹³ Piédelièvre,¹¹⁴ Rivier,¹¹⁵ Leroy,¹¹⁶ Nys,¹¹⁷

¹⁰⁴ *Ibid.*, pp. 48-50.

¹⁰⁵ *Le droit de la guerre maritime*, pp. 4, 6.

¹⁰⁶ *Droit public de l'Europe*, pp. 543-558.

¹⁰⁷ *Droit commercial dans ses rapports avec le droit des gens et le droit civil*, (1874), I, pp. 109-111; 143-144; cited by Boeck, 419-422.

¹⁰⁸ *De l'inviolabilité de la propriété privée des belligérants sur mer*, (1863), p. 7; cited by Boeck, pp. 440-442.

¹⁰⁹ *Vattel's droit des gens* (Paris, 1863), III, p. 107, n. 1; *Droit international public* (Paris, 1885-1906) VIII, pp. 43-135.

¹¹⁰ *Du respect de la propriété privée dans la guerre maritime* (1866); see Boeck, pp. 445-449.

¹¹¹ *Le droit public et l'Europe moderne* (Paris, 1876), II, pp. 290-305; cited by Boeck, pp. 449-450.

¹¹² *Traité de droit commercial maritime* (Paris, 1878), pp. 35-45; cited by Boeck, pp. 450-452.

¹¹³ *De la propriété privée ennemie sous pavillon ennemi* (Paris, 1882), pp. 395-585.

¹¹⁴ *Précis de droit international public du droit des gens* (Paris, 1894-1895), II, pp. 431-439.

¹¹⁵ *Principes du droit des gens* (Paris, 1896), II, pp. 331-332.

¹¹⁶ *La guerre maritime* (Brussels and Paris), 1900, p. 144.

¹¹⁷ *Le droit international* (Paris and Brussels, 1904), III, pp. 454-468.

Bonfils,¹¹⁸ Bon,¹¹⁹ Despagne,¹²⁰ and Peillon¹²¹ have sustained the thesis of immunity with varying degrees of enthusiasm for the principle of the reform.

Cauchy took account of the fact that as civilization has progressed, war has continuously become in larger part a relation between states. But he did not emphasize the legal nature of that relationship, as a principle incumbent upon belligerents to observe. Instead he viewed the respect for private property in war as an evidence of the advance of Christian civilization, as a moderation of the rigorous rights of belligerents by the softening of custom and by the happy development of a generous policy, which proposes to lessen, so far as possible, the evils of war. Cauchy's view of the question is lacking neither in observation of the realities nor in hope for the future.

Boeck, however, maintains that Rousseau's conception of war is the true one, and that it does not entail the consequence that individuals must be regarded simply as onlookers: "Elle signifie simplement que les Etats belligérants ne pourront s'attaquer aux particuliers directement ou principalement, que les droits privés ne sont pas éteints par la guerre et ne dépendent pas du bon plaisir de l'ennemi".¹²² He regards capture as the "direct negation" of the principle that war is a relation of states only and insists that this principle is actually observed in continental warfare.

"Il est non moins certains que des abus ont été fréquemment commis: le principe de l'inviolabilité se heurte dans la guerre continentale à de grandes difficultés d'application. Mais depuis quand les violations de la règle renversent elles la règle elle-même? Parce qu'un principe de droit est violé, ce principe n'existe plus! Plus les abus sont criants, plus le principe s'affirme et doit être maintenu vigoureusement par le jurisconsulte. Là n'est pas la difficulté: la véritable question est de

¹¹⁸ *Manuel de droit international public*, 4th ed, edited by Fauchille (Paris, 1905), p. 730.

¹¹⁹ *La guerre russo-japonaise et la neutralité* (Montpellier, 1909), p. 23.

¹²⁰ *Cours de droit international public*, 4th ed., edited by C. de Boeck, (Paris, 1910), pp. 1071-1075.

¹²¹ *La propriété privée ennemie* (Paris, 1910).

¹²² Boeck, p. 552.

¹²³ *Ibid.*, pp. 553-554. And on p. 555: "On peut donc dire en définitive, que, malgré les réquisitions et les contributions, en dépit de bien des misères et des abus, la propriété privée est respectée sur terre".

savoir si, dans la guerre continentale, les particuliers inoffensifs sont, en règle, respectés dans leur personne et surtout dans leurs biens".¹²³

Capture cannot be likened to contributions in continental warfare, Boeck says, because capture "knows no other bounds than the power of the belligerent while requisitions are restricted to the needs of the occupant". He attacks capture also as inefficient, replying to the argument that represents it as the sole means of attack against Great Britain with the declaration that in view of modern inventions, maritime warfare will increase rather than decrease in effectiveness. As it is, he says: "*Le commerce ennemi échappera aux atteintes des vaisseaux de guerre grâce au pavillon neutre Le moyen d'action ainsi limité n'aura pas, aujourd'hui moins que jamais, cette énergie terrible et décisive que se plaisent à lui attribuer ses partisans.*"¹²⁴ And even though the economic interests of an opponent nation are made to suffer there is certain to be a reflex injury to those of the other belligerent.

He admits the importance of the argument that merchant ships can readily be transformed into warships or used as transports. But he urges that: "*Le fait qu'une catégorie quelconque d'objets pourrait un jour être utilisée pour la guerre ne suffit pas pour la rendre dès à présent sujette à saisie ou à capture . . . le droit ne peut prendre en considération qu'une nécessité militaire actuelle et constatée*". Boeck would permit the capture of such vessels, but not until they were actually in military use or about to be so used immediately. He would have advocated sequestration, with restitution or indemnity at the end of the war, for other sorts of merchant vessels, but for the fact that the expenses of upkeep during war would amount to the vessel's value, and that this would result in great difficulties between the captor state and enemy individuals. Instead, therefore, of sequestration for such ships, Boeck advocates that the right of requisition be established as regards vessels susceptible of employment in warlike operations, and that others, not susceptible of such use, be allowed to go entirely free from any liability. Likewise he would establish a right to preempt enemy cargoes under enemy flags provided they could

¹²⁴ *Ibid.*, p. 557.

be of use in military operations, mentioning such articles as oil, food, and naval stores.¹²⁵

Boeck believed it to be to the interest of neutrals that capture be abolished, because they suffered in common with the belligerent nations from the disturbance of commerce by war. "Mais il ne faudrait pas aller jusqu'à dire, comme on la fait parfois, que les neutres ont droit à ce que le principe du respect de la propriété privée soit reconnu et appliqué par les belligérants."¹²⁶

Considering, finally, the policy most expedient for adoption by Great Britain, France and other states, Boeck comes to the conclusion that for them all the balance of advantage lies with immunity. This is true for England because (1) it would enable her to concentrate her fleet, (2) her existence is absolutely dependent upon her maritime commerce, (3) she cannot hope to secure her immense commerce by placing it under the neutral flag, (4) her possible continental opponents can carry on their commerce through neutral ports, since communications have been so completely developed; it is less certainly true for France because already two-thirds of her commerce is transported in foreign vessels—Boeck does not mention how large a proportion of this amount is carried by English vessels—and the remainder could readily be transferred in time of war. And France can have recourse to the import of necessities by land if necessary. Nevertheless Boeck inclines to agree with Mably that it is to the interest of France to spare herself the injuries which capture involves, since the war of 1870–1871 had demonstrated that "C'est sur terre que se viderait le débat et que se déciderait le sort de la France."¹²⁷ Even though it be granted that capture would be of greater advantage in itself in a war with England,

"croire que la capture est entre les mains de la France une arme aussi redoutable contre l'Angleterre, c'est se faire une étrange et dangereuse illusion, que contredisent l'histoire de la guerre de Cent-Ans, celle de la guerre de la succession d'Espagne, qu'on évoque sans cesse, celle de la guerre de Sept-Ans, enfin l'histoire des guerres de la Révolution et de l'empire".¹²⁸

¹²⁵ *Ibid.*, p. 565.

¹²⁶ *Ibid.*, p. 566.

¹²⁷ *Ibid.*, p. 580.

¹²⁸ *Ibid.*, p. 581.

Subsequent French writers have not advanced the theory beyond the position reached by Boeck. It is of interest to note that Nys, while arguing for immunity principally on practical grounds and on the basis of neutral rights, is in accord with his school in holding that: "Relation d'Etat à Etat et non relation d'homme à homme, la guerre ne peut frapper les biens des particuliers; la règle est vraie dans la guerre sur mer comme dans la guerre sur terre." Pradier-Fodéré has made an extended examination of the history of the question and of its present importance in practice and theory. While asserting strongly the necessity for viewing it as in the main a legal and humanitarian issue, he is willing to regard the necessities of war, and to exclude from protection enemy merchant vessels which "accept directly or indirectly functions which permit their being regarded as instruments of war"; he would also admit with Boeck the propriety of the requisition of merchant vessels of the enemy and of the preëmption of enemy food, oil, clothing, and other like articles on board such vessels, in cases of necessity, while refusing approval to sequestration. This learned writer sums up the prospects for immunity in the following paragraph:

"These three sorts of manifestations—of publicists, of commercial interests, of public agencies—show the progress that has been made and that something other than a chimera is being pursued. The abolition of this iniquitous means of warfare will take place when all states shall have come to realize that, independently of moral considerations, which are nevertheless so fundamental, they are all interested, belligerents or not, in preventing the exchange of the products of their industry and agriculture from being annoyed or interrupted; that by virtue of the solidarity which exists between peoples, one nation cannot be impoverished without prejudice or suffering to others, that to ruin the commerce of his enemy is to prepare the ruin of his own; that private property, finally, should be, in war as in peace, on sea as on land, respected by governments as well as by individuals, because it is at the basis of all society".

Peillon denies the thesis that capture is the sanction of the prohibition by one belligerent of the other belligerent's right to use the seas. "One no longer speaks of interdicting the sea to his enemies." He regards Lorimer's "very curious legal theory" according to which a state should indemnify its citizens for losses sustained through capture as "ingenious but Utopian." "The state," he says, "will refuse to accept the receipt

delivered by the adversary because to accept it would be to invite the remorseless capture of the property of its subjects." He brings out, also, the idea that war at sea is regarded, in spite of the theoretical freedom of private property on land, as more merciful than continental warfare simply on the assumption of non-resistance which he regards as an unnatural assumption. And he denies that mercantile losses through capture are less hard on individuals than losses through requisitions and contributions in land war.

"Every merchant has general expenses, the interest on capital engaged is lost and ruin sometimes follows. The landed proprietor suffers no more than the ravaging of his crops. Merchants can insure themselves, indeed, but if the payment of insurance premiums shall absorb the profits, ventures are useless."

Raynaud goes too far, Peillon holds, in saying that if merchants suffer, so much the worse for them, that they have taken the risk and should expect to stand the loss. "A merchant gains not for himself alone, loses not for himself alone." Injuries to maritime commerce are felt throughout an entire country.

With Boeck, Nys, and Pradier-Fodéré, Peillon agrees as to the propriety of instituting the rights of requisition and pre-emption at sea. He would go farther than the last named and permit sequestration. He believes with Dupuis that other powers than Great Britain would render impossible the abolition of prize today. But he refuses to admit that France would actually lose by the abandonment of prize. "A nous il semble qu'il y aurait progrès à protéger les droits des particuliers. Jamais la guerre ne sera trop douce."

5. Opinion in Other European Countries

It is proper to mention certain other continental writers whose attitudes upon the present question are important. Among these the principal publications opposing the reform are those of Tetens,¹²⁹ Negrin,¹³⁰ Riquelme,¹³¹ and Olivart.¹³² The

¹²⁹ *Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres* (French Edition, Copenhagen, 1805), pp. 10-17 (Danish); cited by Boeck, pp. 415-417.

¹³⁰ *Tratado elemental de derecho internacional marítimo* (1873), pp. 146-161; see Boeck, pp. 549-551.

¹³¹ *Elementos de derecho público internacional* (Mataro, 1875), pp. 258-303.

¹³² *Tratado de derecho internacional público*, 4th ed., (Madrid, 1903), pp. 205-225.

partisans of inviolability are more numerous. Pinheiro Ferreira,¹³³ Rochussen,¹³⁴ Rolins-Jacquemyns,¹³⁵ Saripolos,¹³⁶ F. Martens,¹³⁷ Katchenowsky,¹³⁸ Landa,¹³⁹ Laveleye,¹⁴⁰ Beer Portugael,¹⁴¹ and Kleen¹⁴² have given the advantage of their influence to the movement for reform, an influence which has contributed much to determine the general tone of continental opinion.

6. English Opinion

The English tendency to disregard theoretical for practical considerations has been fully illustrated in the history of the question of inviolability in England. The treatise of Ward which was published in 1801 condemned the idea that commercial peace and military war are compatible and set the general lines which English theorists have since followed.¹⁴³ Manning in 1839 declared that "when war exists between two states, all the individual members of one state are the enemies of all the individual members of the other belligerent state . . .; no pacific relations can be entertained between them, unless under the provisions of express convention; all trade is suspended, no

¹³³ *Cours de droit public interne et externe* (Paris, 1830), II, pp. 106-112, (Portuguese); cited by Boeck, p. 417.

¹³⁴ *De occupatio bonorum privatorum in bello maritimo* (1857) (Dutch); cited by Boeck, pp. 430-431.

¹³⁵ Review of E. Carron's "La course maritime" in *R. D. I.*, 1875, VII, pp. 697-698; "Chronique du droit international" in *R. D. I.*, 1878, X, p. 26.

¹³⁶ *The Law of Nations* (Athens, 1861), II, pp. 424-434 (Greek); cited by Boeck, p. 460.

¹³⁷ *Les droits de la propriété privée pendant la guerre* (1869, Russian); cited by Boeck, p. 460.

¹³⁸ *Prize Law* (London, 1867), pp. 182-183 (Russian); cited by Boeck, pp. 460-461.

¹³⁹ *El derecho de la guerra conforme a la moral* (1877), II, pp. 116-122; cited by Boeck, pp. 461-462.

¹⁴⁰ *Du respect de la propriété privée sur mer en temps de guerre* (Brussels, 1875), and in *R. D. I.*, 1875, pp. 559-602.

¹⁴¹ *Oorlogs-en neutraliteitsrecht* (The Hague, 1907), pp. 344-347.

¹⁴² *Lois et usages de la neutralité* (Paris, 1900), II, pp. 689-691.

¹⁴³ *Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs* (Repub. London, 1875) *Passim*.

contracts are legal, no debts can be enforced, and no suits sustained in courts of law, by or against an enemy.”¹⁴⁴ Wildman,¹⁴⁵ Phillimore,¹⁴⁶ and Twiss,¹⁴⁷ similarly refuse to accept the continental formula upon the legal relationships created by war. Not so Lorimer¹⁴⁸ who admits that: “War being a public relation entered into by states in their political capacity, and for public purposes, and not by their private citizens for private purposes, the rights which war confers are public rights only.” But he avoids the consequences which other writers have drawn from this maxim by asserting that the state may convert private rights into public, and private property into public, e. g., the state demands taxes, it may condemn a man’s property on condition of payment at a value set by the state. Therefore, although belligerency does not entitle the belligerent to enforce a sale on the private owner, there can be no doubt that, in accordance with the law of nations, it entitles him to enforce purchase on the state of which the private owner is a citizen. From these premises, Lorimer works out his plan of state indemnification for the losses of private citizens, owners of property captured by the enemy, a plan which, while freeing particular individuals from unjust burdens at the same time converted the losses from an indirect into a direct means of pressure working in the interests of peace. Lorimer did not desire the abolition of capture which he held to be the least dangerous to life and to morals of all forms of warfare, a real means of economic pressure, and to England a right which could affect no injury to her carrying trade that could not be covered by “the merest trifle of increased insurance,” while “as the maritime trade of the opposite belligerent would be annihilated, it is probable that the belligerent value of the retention of the right would greatly outweigh any loss which [England] should sustain from neutral competition.”

¹⁴⁴ *Law of Nations*, p. 166.

¹⁴⁵ *Institutes of International Law* (London, 1849), II, p. 8.

¹⁴⁶ *Commentaries upon International Law*, III, pp. 120–122.

¹⁴⁷ *Law of Nations*, II, p. 141 ff.

¹⁴⁸ *The Institutes of the Law of Nations* (Edinburgh and London, 1883–1884), II, p. 93ff.

Lorimer thus suggests that insurance may render his own plan unnecessary. In so doing he was undoubtedly taking too sanguine a view of the effect of war or rumors of war upon insurance rates, and the wisdom of such a plan as that developed by him was affirmed by the report of the *Royal Commission on the Supply of Food and Raw Material in Time of War*.¹⁴⁹

This idea, though one for municipal and not international law to develop, has an interest which may justify the observation that the natural reluctance of a government to undertake unnecessary expenses would probably be too strong to be overcome. Commerce being a profitable undertaking, especially in time of war, it is doubtful whether merchants would ever be driven to cover to such an extent as to make it necessary for a country, in order to obtain what it needs by sea, to encourage them by offers of indemnity. On the other hand, no government would wish to indemnify, if the enemy had gained such pronounced supremacy as to render the capture of an adventurous merchantman practically certain.

Sheldon Amos was the forerunner of English writers more encouraging to the partisans of immunity, seeing in war a struggle between states and noting the tendency toward a more merciful treatment of enemy property at sea.¹⁵⁰ Contemporaneously with his lectures there were published two books by members of the Maritime League for the Resumption of Naval Rights in Great Britain, which not only refused to consider immunity, but demanded the renunciation of the Declaration of Paris.¹⁵¹

The list of English writers might be greatly extended.¹⁵² For

¹⁴⁹ *Parliamentary Papers*, Cd. 2643, sec. 266, 1905. See postea. B.

¹⁵⁰ *Lectures on International Law* (1874), IV and VI; see Boeck, pp. 546-547.

¹⁵¹ Johnstone, *Handbook of Maritime Rights* (London, 1876), pp. 25-142; cited by Boeck, pp. 547-548; Bowles, T. G., *Maritime Warfare* (2nd ed., London, 1878); see Boeck, pp. 548-549; *Sea Law and Sea Power* (London, 1910), also by Mr. Bowles, vehemently attacks the movement for immunity. On August 8, 1914, Mr. Bowles urged that England should renounce the Declaration of Paris (*Times*, London, August 8, 1914, p. 9). Professor Holland replied that the suggestion was one against which it was superfluous to argue since the rules of the Declaration had met with general acceptance for nearly sixty years. (*Times*, London, August 14, 1914, p. 7.)

¹⁵² The monographs of Bentwich, Norman, *The Law of Private Property in War* (London, 1907); of Latifi, Alma, *Effects of War on Property* (London, 1909); and of Loreburn, Earl, *Capture at Sea* (London, 1913); and the

the purpose of obtaining a correct estimate of professional opinion in England today the views expressed by Hall, Westlake, and Lawrence will suffice, those of Oppenheim having already been noted.¹⁵³

Hall condemns the doctrine that war is a relation simply between states (1) as being a fiction which rests upon an impossible "distinction between the public and private aspects of the individual" and (2) as being "mischievous," in that it is deliberately made the "false basis" of the argument which brands "a practice as an iniquitous contravention of rule, which in reality is in harmony with the ground principles of the laws of war."¹⁵⁴ In answer to the assertion that it is unjust to retain this last exception to the principle of immunity he points to the subjection of private individuals to contributions and requisitions. To the argument for the application of greater humanity to sea warfare he replies that not only is capture more mild in effect than requisition, but that it is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be.

Writing in 1875 the same writer had analyzed the international situation and drawn from it the conclusion that the preponderance of opinion in favor of inviolability was such as to justify Great Britain in renouncing her traditional policy. "So far as the immunity of hostile private property at sea is concerned, the answer to the question [the advisability of accepting innovation] depends in the main upon whether England will do more harm to her enemies by capturing their property than she will by losing her own."¹⁵⁵ But another and important consideration was the

pamphlets of Hirst, F. W., *Commerce and Property in Naval Warfare* (London, 1906); of "Mancunian", *The Freedom of Commerce in War* (London, 1914); and of Macdonnell, Sir John, *Some Plain Reasons for Immunity from Capture of Private Property at Sea* (London, 1910) are concise and quite readily available. That of Cohen, Arthur, *The Immunity of Enemy's Property from Capture at Sea* (London, 1909) is often quoted but is apparently difficult to obtain even in England and has not been accessible to the writer.

¹⁵³ Antea, p. 85.

¹⁵⁴ *International Law*, 6th ed., edited by J. B. Atlay (Oxford, 1909), pp. 63-70.

¹⁵⁵ "On Certain Proposed Changes in International Law", in *Contemporary Review*, 26, 1875, p. 737.

"weight and bulk of opinion. Neutrals will not throw their sword into the scale for the sake of an abstract principle; but their interests will be directly affected to the extent that their trade with the belligerent whose ships are captured is carried on in his vessels and by his merchants. They may suffer by the privation of commodities which are necessary to their comfort, or to the existence of their industries; and their traders may see their profits disappear in the forced sales which they are practically reduced to make when vessels laden with their goods are captured and taken into the ports of a country which is not their intended market. If the injury which they receive is not enough to move them to active interference, their neutrality will become malevolent, and an inclination to embarrass the power which hurts them will grow, the more that they look upon the mischief which is done to them as unnecessary, and the motive which causes its infliction as unjustifiable".¹⁵⁶

Hall regarded the governments and publicists of Russia, Germany, Austria, Italy, and the minor states as at that time ready and anxious to obtain the general adoption of inviolability.

Answering the ultimate question, that of the direct effects of capture in war, Hall contended: (1) that England's navy was inadequate both to give battle and to defend her enormous commerce; (2) that English commerce, being essential to England's existence, was more sensitive than that of any other country; the effects of uncertainty shown by the rise of insurance rates to a prohibitive level, and in the transfer of ships to neutral registry, would be more severe if England were at war than they had been in the American Civil War. Granted that in the meantime the shipping of her enemy would be ruined, the relative unimportance of that industry to any country except England would mean a correspondingly less significant injury to it; (3) that England's dependence upon other countries for her food and raw materials was absolute, and that these articles could not be obtained by the use of neutral ships at the beginning of a war if indeed at any time; that this was not true of any of her possible opponents. His general conclusion was: "The fact is, whether we like to face it or not, that in a purely maritime war England can reap little profit and might find ruin."¹⁵⁷

In his later work Hall comments briefly upon this article:

¹⁵⁶ *Ibid.*, p. 739.

¹⁵⁷ *Ibid.*, pp. 743-751.

“The reasons which were then urged have grown stronger with each successive year; and the dangers to which the practice would expose the country are at length fully recognized.”¹⁵⁸

Lawrence regards it as axiomatic that capture cannot be consistently attacked on humanitarian grounds by those who carry on land warfare. And he contends that the facts need only be remembered to enable one to traverse the contention that war is simply a relation of state to state.

The decision for or against the abolition of capture must be made—since capture is relatively, if not absolutely, inhumane—after balancing the acknowledged moral gain that would accrue against the influence of capture in shortening and preventing wars. To the generality of states today capture would not operate as a potent means of offense nor would it cause them to discontinue fighting. To certain states such as the United States the right would be of minor importance, to such as Norway it might be fatal.

The considerations that must move England, says Lawrence, are (1) that neutral shipping would not be capable of carrying British commerce and that, even if neutral capital could finance the purchase of British vessels, the enemy would refuse to recognize their transfer as valid; and (2) that since she must continue to carry on the greater part of her commerce herself, it is absolutely essential that England be able so to minimize risks as to prevent panic freight and insurance rates.

Lawrence doubts the ability of the English navy to maintain such continuous control of the routes of commerce as to assure the safety of commerce. And he points out the uselessness of capture against weak mercantile powers and the superiority of blockade against an insular power. But he undoubtedly lays too much stress upon the sanctity of international agreements and upon the permanence of the Declaration of London, to which he looks for a prevention of any “great stretching of the law of contraband and blockade.”¹⁵⁹ Based upon these arguments his conclusion “that on the whole the proposed change would be beneficial” is less encouraging than partisans of immunity would desire.

¹⁵⁸ *International Law*, p. 442.

¹⁵⁹ *Principles of International Law*, 5th ed., (London, 1913), pp. 499–508.

Westlake dissociates the question of immunity from any theory of the relations between states and their subjects; the "justification [of capture] must lie in its effect on the fortunes of a war." For England the most important aspect of the problem is that of the means which capture provides for preventing an invasion by the capture of possible transports and their crews.¹⁶⁰ The argument which is based upon the probable transfer of British ships to neutral registry he holds to be ineffective for practical reasons, such as we have already noted; that which points to England's economic dependence is weak in that it fails to provide for probable extensions of blockade and contraband; neutrals are to be considered, but their complaints do not become dangerous if wars are short; it is illogical for a state to demand that sequestration replace capture while refusing to indemnify its own nationals.

In view of these facts, and since, further, the liability of distress is being constantly reduced by the development of insurance, and because the use of steam has lessened the danger of capture which has never proved fatal in past wars "there does not . . . seem any sufficient reason why England should promote the immunity of private property at sea from the burden of military necessity, which lies heavy on private property on land in the shape of requisitions and contributions."¹⁶¹

These three arguments, then, place little emphasis upon the capacity for offensive operations which capture provides to the greatest of naval powers. Hall and Lawrence, while assuming that Great Britain would in any war eventually gain control of the seas, consider the dangers of an interim period too great to be compensated for later, especially (in the view of Hall) when the ultimate gaining of supremacy is likely to result in arousing neutral hostility. And Westlake regards capture not so much as a direct weapon of offense as an indirect one of defense.

A third aspect of the question is given most attention, i. e., the importance of capture as a means of offence *against* England. As we have seen, Westlake declines to accept the gloomy

¹⁶⁰ The right to imprison the crew of a merchant vessel has been rendered doubtful, to say the least, by XI H. C. Art. 6; see Scott, *H. P. C.*, II, p. 467.

¹⁶¹ *International Law* (1907), II, pp. 130-132.

deductions of Hall, whereas Lawrence enlarges upon them. We have already observed that Oppenheim is a partisan of capture. In view of this contrariety of opinion, the question of what policy may be best for Great Britain to advocate may well be considered difficult of determination.¹⁶²

7. American Opinion

The opinions of publicists in the United States are of interest in contrast with the consistent policy of our Government in favor of immunity. The foremost among them, Wheaton, justifies capture without reference to the peculiar circumstances of his own country.¹⁶³ Halleck also follows the English school.¹⁶⁴ Dana, Mahan, and Stockton have taken a position of hostility to the proposed reform. Dana bases his view upon general considerations regarding the nature of private property at sea.¹⁶⁵ Stockton believes that the United States has now no interest in procuring inviolability and that the right of capture should be retained as a preventive of war.¹⁶⁶ Mahan refutes the attempt at drawing an analogy between property on land and at sea; the latter he declares is "not private property in the ordinary sense of the word" but is "engaged in making money for the state." To interfere with external commerce "conduces directly to the ends of the war by producing a bloodless exhaustion, compelling submission, and that at the least expense of life and suffering." In the same connection he says:

"In view of the limitation of their means, otherwise, for enforcing their necessary policy they [sea powers] should at least delay, and maturely weigh the general question, before, in deference to supposed particular advantage, they pledge themselves antecedently to the greater immunities now clamorously demanded".¹⁶⁷

¹⁶² Professor Holland has expressed an opinion unfavorable to the prospects of immunity. For his opinion see article by Admiral Stockton in *A. J. I. L.* (1907), pp. 935-936.

¹⁶³ *Wheaton's Elements of International Law* (1836), edited by Coleman Phillipson (London, 1916), p. 569.

¹⁶⁴ *Halleck's International Law* (1861), Baker's ed. (London, 1908), II, pp. 1, 98.

¹⁶⁵ J. B. Atlay's Edition of *Wheaton* (London, 1904), p. 498.

¹⁶⁶ *Outlines of International Law*, (New York, 1911), pp. 310-343; "Immunity from Capture" in *A. J. I. L.*, 1907, pp. 930-943.

¹⁶⁷ *The Problem of Asia* (Boston, 1900), pp. 51-54.

On the opposing side of the question in the United States the writings of Lieber,¹⁶⁸ Dudley Field,¹⁶⁹ Woolsey,¹⁷⁰ Butler,¹⁷¹ and Professor Hershey,¹⁷² may be cited as representative.

Finally, it should be noted that the learned Argentinian publicist, Calvo, has urged the proposition of reform.¹⁷³

Discussion of the facts and tendencies which are emphasized in the history of the theory of immunity will be left to a later chapter. The conclusions to which the study of theory leads may be rendered more practical by observing the activities of public and private agencies, to some of which the proposed reform has appeared worthy of consideration, to others essential. This purpose the second part of this chapter aims to serve.

B. PUBLIC AND PRIVATE PROPOSALS FOR REFORM

Previous chapters have outlined those projects, for complete or partial acceptance of the principle of respect for private property at sea, which succeeded in becoming a part of the practice of certain states. This portion of the present chapter will present a sketch of the more important concerted efforts which have been made at intervals by legislative, commercial, and scientific bodies, efforts which, though not to be ranked with those previously examined, undoubtedly have contributed more than can be estimated to the successful entrance of the latter into practical affairs.

On May 29, 1792, Deputy Kersaint of Paris laid before the *Corps Législatif* a proposal to suppress, without condition of reciprocity, both privateering and capture by public armed ves-

¹⁶⁸ "Reflexions et projets à propos de ventes d'armes," etc. in *R. D. I.*, 1872, p. 467ff.

¹⁶⁹ *Outlines of an International Code*, 2nd ed. (New York, 1876), pp. 526-530.

¹⁷⁰ *International Law*, 6th ed. (New York, 1890), pp. 239-240.

¹⁷¹ "Freedom from Capture" in *N. A. R.*, CLXVIII, p. 55; "Immunity of Private Property" in *Report of International Law Ass'n* (1900) p. 66 ff. Mr. Butler compiled (in 1898) a list of documents concerning inviolability which were transmitted by the Secretary of State to the representatives of the United States at the first Hague Conference. (*Doc. of State Department*, May 20, 1899).

¹⁷² *Essentials of International Public Law* (New York, 1912), p. 441, n. 56.

¹⁷³ *Le droit international* (Paris, 1896), 5th ed., IV, p. 332 ff., VI, pp. 504-505.

sels. In view of the contrary practice of enemy nations M. Granet proposed to abolish both practices on condition of reciprocity only; M. Lasource wished to abolish privateering only, while a fourth proposition recommended proposals to other states to that end. The debate, though mainly concerned with privateering, included an exposition of the arguments for and against prize in general, and was terminated by the adoption of a resolution asking the executive to negotiate with foreign powers for the abolition of privateering. To the circular sent out, the United States was the only great power to reply in a favorable sense. Hamburg, Bremen, and Lübeck gave their unconditional adherence. The French Government, therefore, on January 7, 1793, decreed the maintenance of privateering.¹⁷⁴

The Panama Congress of 1826 did not accomplish any material result in the direction of immunity.¹⁷⁵ Calvo says, however, that its work constitutes, by its general tendencies, one of the historical antecedents of the doctrine proclaimed thirty years later by the Congress of Paris.¹⁷⁶

With the signing of the Declaration of Paris there began in England the struggle between the partisans of the rules which it contained, who frequently desired further advance, and those who believed that England should maintain the ancient practice. Cobden, on November 8, 1856, wrote to the Manchester Chamber of Commerce a letter in which he expressed regret that England had not herself taken the initiative in proposing the more complete reform advocated by Marey.¹⁷⁷ On November 10 of the same year Lord Palmerston assured the Liverpool merchants of his satisfaction with the Declaration and of his belief that complete freedom from capture would soon be accorded to commerce, adding the oft-quoted declaration that there had been no historical instance of the conquest of an important power by inflicting losses upon individuals.¹⁷⁸ Yet by 1860 Palmerston's attitude had changed and he replied to a deputation of English merchants, who urged him to sustain before Parliament the abo-

¹⁷⁴ Boeck, pp. 62-69, gives the documents.

¹⁷⁵ Butler, "Immunity of Private Property" in *Report of I. L. A.* (cit.), p. 63, n. 42.

¹⁷⁶ *Droit international*, IV, p. 335.

¹⁷⁷ Boeck, p. 423.

¹⁷⁸ *Ibid.*, p. 425.

lition of capture, that a maritime power like England could not renounce any means of weakening its enemy.¹⁷⁹

As early as 1857 the question of the effect that the Declaration of Paris would have upon English maritime power had been raised in Parliament. In that year Mr. Lindsay and Mr. Bentinck expressed their distrust as to the wisdom of England's accession. And Lord John Russell, while maintaining that it was beyond the power of England to withdraw from the Declaration of Paris, uttered opinions that show how great a pressure of foreign influence must have been required in order to bring England to an acceptance of the Declaration. Lord Russell believed with Mr. Lindsay that the principle of the second rule of the Declaration was wrong. He said:

"I quite agree that the way in which we have been able to finish wars with great Powers, especially with France, has chiefly been by destroying the enemy's trade. We have brought the Powers with which we have been at war to such a state that their finances have become disordered. They have been ready to listen to terms of peace, and thereby the wars have been terminated. But now, if we were at war with America, or France, they could maintain their trade in full vigor, because manufactured produce throughout the world could be sent in neutral vessels in perfect safety".¹⁸⁰

The agitation intended to bring about England's repudiation of her signature to the Declaration was resumed in Parliament in 1874 and again in 1877. The question has, however, been so definitely settled in a sense contrary to that agitation as to render further notice out of place here.¹⁸¹

¹⁷⁹ *Ibid.*, p. 124.

¹⁸⁰ *Hansard*, 3rd series, CXLVI, (July 14, 1857), pp. 1486-1492.

¹⁸¹ Important discussions on the Declaration of Paris occurred in the House of Commons on August 5, 1867 (*Hansard*, 3rd Series, CLXXXIX, pp. 878-884), April 13, 1875 (*Ibid.*, CCXXIII, pp. 822-864), and March 2, 1877 (*Ibid.*, CCXXXII, pp. 1262-1243). These vehement debates led Dr. Louis Gessner in his *Zur Reform des Kriegs Secrecchts* (Berlin, 1875), an abridged translation of which appeared in *R. D. I.* 1875, VII, pp. 236-255, to criticise somewhat harshly the attitude of British statesmen toward reform of maritime law. To this arraignment, Westlake replied (*R. D. I.*, 1875, pp. 256-268), asserting that, excepting Lord John Russell, not a single Liberal Minister had expressed the desire to withdraw from the Declaration of Paris and naming from among these ministers Palmerston, Clarendon, G. C. Lewis, the Duke of Argyll, Granville, Grey, Selborne, Gladstone, and Bright. Among the Conservatives Northcote and Derby had declared for the maintenance of the Declaration, while Disraeli, Salisbury and Carnarvon, though

In the same period two important debates took place in the House of Commons upon resolutions looking toward immunity. On March 11, 1862, Mr. Horsfall introduced the motion: "That the present state of International Maritime Law, as affecting the rights of Belligerents and Neutrals, is ill-defined and unsatisfactory, and calls for the early attention of Her Majesty's Government." The motion was strongly opposed by the Government and was finally withdrawn.¹⁸² On March 2, 1866, Mr. Gregory proposed, but after the debate withdrew, an amendment to the above motion of Mr. Horsfall, to the effect: "That an humble address be presented to Her Majesty, praying that she will be graciously pleased to use her influence with foreign Powers for the purpose of making the principle that private property should be free from capture by sea a maxim of International Maritime Law."¹⁸³ In the same year a commercial convention at London placed itself on record as desirous of immunity.¹⁸⁴

On the continent similar manifestations were taking place. In 1859 a conference of German merchants at Bremen passed resolutions favoring the inviolability of persons and property at sea in time of war. This was adhered to by the Chambers of Commerce in many German and English cities.¹⁸⁵ In 1860 M. Ronne introduced into the Prussian Landtag a motion expressing the hope for governmental action with a view to increasing the prospects of legal immunity, but no vote was taken.¹⁸⁶ In 1868 the Diet of the North German Confederation adopted unanimously a motion of Dr. Aegidi in a similar sense.¹⁸⁷

In France the question of immunity received considerable attention in the years immediately preceding the war of 1870—

opposing it on principle, had not supported the motion of 1875 looking to its repudiation.

¹⁸² *Hansard*, 3rd Series, CLXV, pp. 1359-1391, pp. 1599-1706.

¹⁸³ *Hansard*, 3rd Series, CLXXXI, pp. 1407-1480.

¹⁸⁴ Laveleye, in *R. D. I.*, (1875), pp. 572-574.

¹⁸⁵ Calvo, IV, pp. 338-339.

¹⁸⁶ Laveleye, p. 572.

¹⁸⁷ "Le chancelier fédéral est invité à profiter des relations amicales actuellement entretenues avec les puissances étrangères pour provoquer des négociations dans le but d'élever par voie de conventions d'état à état, la liberté de la propriété privée sur mer en temps de guerre à la hauteur d'un principe reconnu de droit international"; Laveleye, p. 574.

1871. On April 11, 1866, before the *Corps Législatif*, Deputy Garnier-Pagès moved for public action to bring about immunity.¹⁸⁸ On July 17, 1870 he introduced a bill to provide that

"La France déclare inscrire dans son code maritime les dispositions suivantes:

"Art. I. Sont abolies la capture et la prise par les bâtiments de l'État des bâtiments de commerce ennemies, appartenant à des nations qui, avant la déclaration ou les faits de guerre, auront accepté ou accepteront la reciprocité."

The proclamation of the King of Prussia issued on the following day, renouncing the right of capture for the war about to begin, did not assist the bill, which failed of passage.¹⁸⁹

The Brussels Conference of 1874 to which fifteen states sent delegates, failed to include the first two of the "principes généraux" submitted by the Russian Government, which embodied the idea that war is a relation of states only.¹⁹⁰ In deference to the wishes of the British Government, the Conference did not discuss the reform of maritime law.¹⁹¹ Moved by the desire to preserve the remainder of her maritime rights, England refused even to participate in a second conference which it was proposed should be held at St. Petersburg.¹⁹²

The Institute of International Law in 1874, the year of its founding, appointed a commission for the study of the question of immunity. To this commission one "general preliminary question" was addressed along with a number of "special questions". The general question inquired whether "there exists in the nature of things a principle of reason or law upon which there could be founded a distinction between the treatment of private enemy or neutral property in maritime warfare, and the treatment of the same property in land warfare".¹⁹³ To this question the reply was a unanimous negative.¹⁹⁴ The commission recommended the adoption of the formula used by the Gov-

¹⁸⁸ Boeck, pp. 127-128; Laveleye gives April 13 as the correct date.

¹⁸⁹ Laveleye, p. 575.

¹⁹⁰ Rolin-Jacquemys, G., "Chronique du droit international" in *R. D. I.* VII, (1875), p. 97.

¹⁹¹ Gessner, in *R. D. I.*, (1875), p. 239.

¹⁹² *Ibid.*, p. 239; Hall, *Contemporary Review*, 26, p. 737.

¹⁹³ *R. D. I.*, (1875), p. 553.

¹⁹⁴ *Ibid.*, p. 603.

ernments of Prussia, Austria, and Italy in 1866: "Les navires marchands et leurs cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essaient de violer un blocus effectif et déclaré". This formula was adopted by the institute in the session of 1875 at the Hague, with a reservation concerning merchant ships "que, directement ou indirectement, prennent part ou sont destinés à prendre part aux hostilités".¹⁹⁵

In 1877, in session at Zurich the Institute adopted extremely liberal resolutions regarding the treatment of private property in maritime warfare:

1. "La propriété privée neutre ou ennemie naviguant sous pavillon ennemi ou sous pavillon neutre est inviolable.

2. "Sont toutefois sujets à saisie: les objets destinés à la guerre ou susceptibles d'y être employés immédiatement. Les gouvernements belligérants auront, à l'occasion de chaque guerre, à déterminer d'avance les objets qu'ils tiendront pour tels. Sont également sujets à saisie les navires marchands qui ont pris part ou sont en état de prendre immédiatement part aux hostilités, ou qui ont rompu un blocus effectif et déclaré".¹⁹⁶

In its session of 1882 at Turin the Institute adopted, as the fourth article of the *Dispositions Générales* in its *Règlement International des Prises Maritimes*: "La propriété privée est inviolable, sous la condition de réciprocité et sauf les cas prévus au Sec. 23". Article 23 declared under what conditions the seizure of enemy or neutral ships or cargoes should be legal, making no distinction between enemies and neutrals.¹⁹⁷

¹⁹⁵ Session de La Haye, *Annuaire de l'Institut*, I (1877), pp. 118-119.

¹⁹⁶ *Annuaire*, II, p. 152; also see 55-113.

At Zurich the Institute named a commission of sixteen members to prepare a report upon the law of maritime prize. M. Bulmerincq's exhaustive report may be found in *R. D. I.*, (1878), pp. 185-268, 384-444, 595-655 (analysis of the law of prize in the principal states); and in *R. D. I.*, (1879), pp. 152-215, 320-358 (the theory of the law). Based upon this report is Bulmerincq's treatise: *National Laws and a Project for International Regulation of Maritime Prize*, *R. D. I.*, (1879), pp. 561-650; (1880), pp. 187-205; (1881), pp. 447-515; (1882), pp. 114-190. The *Règlement international des prises maritimes*, constructed largely upon Bulmerincq's work, was adopted in sections by the Institute in its sessions of 1882 at Turin, *R. D. I.*, XIV, pp. 601-609, of 1883 at Munich, *R. D. I.*, XV, pp. 607-611 and of 1887 at Heidelberg, *R. D. I.*, XIX, pp. 348-353.

¹⁹⁷ A. R., in *R. D. I.*, XIV, (1882), pp. 602, 601.

In 1912 at Christiania the Institute determined *inter alia* with regard to the *Manuel* about to be issued on the law of war at sea that: "l'Institut maintient fermement sa résolution antérieure en ce qui concerne l'abolition de la capture et de la confiscation de la propriété privée ennemie dans la guerre maritime."¹⁹⁸

In order to show due deference to actualities, the resolution of 1912 contained a *vœu* that the Commission appointed by it should construct two manuals, one to provide for the regulation of maritime warfare under the rules of capture, the other to assume the actual existence of immunity. The Commission in 1913 presented a *Manuel* founded upon the right of capture, which was adopted by the Institute in its session of that year at Oxford.¹⁹⁹ Article 33 provides: "Les navires publics et les navires privés, de nationalité ennemie, avec les marchandises ennemies, publiques ou privées, qui existent à leur bord, sont sujets à capture, c'est à dire à saisie entraînant confiscation".²⁰⁰

The Interparliamentary Union voted in its session of 1910 at Brussels: "1. Qu'on convînt aux Conférences prochaines de respecter l'inviolabilité de la propriété privée sur mer".²⁰¹ The members from England, France, and Russia were requested to make representations to their Governments with a view to bringing about a change of attitude upon the question. The English members were unable to do so, being fully engaged in efforts to obtain the assent of their Government to the Declaration of London. M. Maurice Colin brought the question before the French Parliament on January 16, 1911, and it was accorded the approval of M. Pichon, Minister of Foreign Affairs. M. Elfremoff in the Duma requested that the question of immunity be

¹⁹⁸ *Annuaire*, 25, (1912), p. 600; Rolin, Albérie, in his report of this session, *R. D. I.*, 2nd Série, XIV, (1913), p. 543, observes: "Il est remarquable que c'est pour la troisième fois [it was actually the fourth instance] que l'Institut, composé d'éléments différents, maintient avec fermeté le principe de l'inviolabilité de la propriété privée dans la guerre maritime".

¹⁹⁹ *Annuaire*, 26 (1913), pp. 610-672.

²⁰⁰ *Ibid.*, p. 618. The same article is rendered differently in the *Manuel* as published with the report of Jaquemyns, E. R., *R. D. I.*, 2nd Série, XV, (1913), p. 685: "Les navires publics et les navires privés, de nationalité ennemie, sont sujets à capture et les marchandises ennemies, publiques ou privées, qui existent à leur bord, sont passibles de saisir".

²⁰¹ Roszkowski, Gustave de, "L'union interparlementaire" in *R. D. I.* 2nd Série, XVI, (1914), p. 158.

made a subject for discussion at the third Hague Conference. The reply of the Russian Government is not known.²⁰²

The resolutions of the Interparliamentary Union, the members of which are in the main present or past members of national parliaments, would appear to have a practical significance and to provide a needed complement to those of the Institute.

The International Law Association discussed the question of immunity thoroughly in 1900 at Rouen, but came to no more advanced conclusion than that there was "no occasion to pass any resolution regarding the subject under discussion".²⁰³ In 1906 the Association appointed a committee to consider the subject²⁰⁴ and discussed the organizing of a convention of British merchants and lawyers, in order to learn their views with respect to inviolability.²⁰⁵ Neither idea resulted in any important action being taken.

Within the last two decades the question of immunity has received large consideration in other than scientific assemblies. On March 4, 1892, a group of members of all parties in the Reichstag introduced a resolution requesting the Chancellor to make use of the cordiality then prevailing between nations in order to secure the recognition of immunity as a principle of international law. The Chancellor, Count Caprivi, replied that he would willingly undertake the task, were it not an impossible one to perform. Capture, he said, may become today the sole recourse for compelling an enemy country to submit by cutting off her commerce. And the character of modern merchant ships was such that they would have to be destroyed in order to prevent their use as auxiliaries to military operations.²⁰⁶

²⁰² Roszkowski, Gustave de, "L'union interparlementaire" in *R. D. I.*, 2nd Série, XVI, (1914), p. 174. The Union had voted in its conference of 1892 at Berne: "La Conférence prie ses membres d'engager les Parlements auxquels ils appartiennent d'inviter les gouvernements à faire reconnaître par une Conférence internationale le principe du droit des gens de l'inviolabilité de la propriété privée sur mer en temps de guerre." This resolution was voted again in the conference of the Union at the Hague in 1894 and at Christiania in 1899. See article by Roszkowski in *R. D. I.*, (1914), p. 24.

²⁰³ *Report of the Rouen Conference of the I. L. A.* (London, 1901), p. 298.

²⁰⁴ *Report of the Berlin Conference of the I. L. A.* (London, 1907), pp. 233-234.

²⁰⁵ *Ibid.*, pp. 15-16.

²⁰⁶ Calvo, VI, pp. 437-438.

On April 27, 1903, a Royal Commission was appointed in England to "inquire into the conditions affecting the importation of food and raw material into our United Kingdom . . . in time of war . . ." ²⁰⁷ This commission examined witnesses from chambers of commerce, members of produce commissions, grain companies, insurance companies, brokers' associations, expert agriculturists, Board of Trade officials, shippers, and professors of international law, and prepared a report in which is presented: (1) the position of the United Kingdom with regard to supplies and stocks of foodstuffs and raw materials in time of peace, (2) an estimate as to the effect of a maritime war upon British supplies and oversea trade, (3) an examination of the proposals regarding schemes for increasing the present stocks of wheat in the United Kingdom, and for insurance of war risks by the state, and (4) the conclusions of the commission.

The most important conclusion arrived at was that, due to the small supply of food normally on hand in the United Kingdom, ²⁰⁸ there would exist in time of war a real danger of a panic rise of prices which might so influence national opinion as to embarrass military operations. ²⁰⁹ The commission, however, held the naval and shipping evidence to be conclusive as to the point that "not only is there no risk of a fatal cessation of our supplies, but no reasonable probability of serious interference with them, and that, even during a maritime war, there will be no material diminution in their volume", ²¹⁰ unless England should lose command of the sea.

No satisfactory conclusion was reached as to the best means of increasing the normal food supply. The commission expressed itself most definitely upon the usefulness of some system of national indemnity, to "operate both as an additional secur-

²⁰⁷ *Parliamentary Papers*, (1905), 39, p. XI.

²⁰⁸ " . . . it is safe to assume that the stock of wheat within the United Kingdom, which usually represents about seventeen weeks' supply in September, will not fall below seven weeks' supply, except in the month of August when it might be six and one-half weeks". *Parliamentary Papers*, (1905), 39, p. 58. On p. 59 it is stated that, supplies being drawn from all parts of the world, an enemy would find great difficulty in interfering with them effectively.

²⁰⁹ *Ibid.*, p. 60.

²¹⁰ *Ibid.*, pp. 27, 59.

ity to the maintenance of our oversea trade and as an important steadying influence upon prices".²¹¹

The majority report makes no reference to any project for the alteration of international law. Paragraph 248 which may partially explain the indifference to any legal reform, has a greater interest today than when it was written:

"Turning to the position of this country in time of war, we think that it would be unwise to allow the safety of our supplies to depend too largely upon the observance of every rule of International Law by a hostile Power. At the same time we consider International Law to be one of the factors which will contribute in an important degree to the maintenance of our security by placing restrictions upon the operations of our enemies. An example will illustrate our meaning. It is no doubt true that the rules to the effect that the neutral flag covers enemies' goods except contraband of war, and that neutral goods unless contraband are free even when carried in a belligerent bottom, might conceivably be evaded by a declaration that foodstuffs were unconditionally contraband. *Such a declaration, however, would in itself be a violation of International Law, against which neutrals would be sure to protest, and, as recent experience has shown, with every prospect of success*".²¹²

In 1908 a "Treasury Committee on a National Guarantee for the War Risks of Shipping", appointed on the recommendation of the commission, presented a report unfavorable to any system of national indemnity.²¹³ The immediate objects of a state guarantee which were considered by the committee included:

(a) The maintenance of public confidence during war, and especially during the periods of uncertainty immediately preceding and succeeding the declaration of war.

(b) The encouragement to shipowners and cargo-owners to continue their business during such periods.

(c) The liberation of the Admiralty from the pressure of an uninstructed public opinion adversely criticising their strategic disposi-

²¹¹ *Parliamentary Papers*, (1905), 39, p. 62. On the same page the commission reports: "We look mainly for security to the strength of our navy; but we rely in only a less degree upon the wide-spread resources of our commercial fleet . . . and we believe that a guarded and well-considered scheme of National Indemnity would act as a powerful addition to our resources . . .".

²¹² *Ibid.*, pp. 58-59. (Italics by the writer).

²¹³ *Parliamentary Papers*, (1908), 58, Cd. 4161, pp. 3-50.

tions on the ground of commercial losses and possibly affecting detrimentally the conduct of the war.

(d) The removal of any temptation to lay up British ships or to transfer British trade and shipping to a neutral flag.

(e) The elimination of the amount by which war insurance would at such a time increase the cost of commodities.

(f) The maintenance of the supremacy of the British mercantile marine in time of war.

(g) The maintenance of our oversea supplies of food and raw material without an excessive rise in price".²¹⁴

The dissenting member of the committee, Sir George S. Clarke, based his contention that state action was necessary upon his fear of

"the exaggeration of war risks leading to excessive and violently fluctuating insurance rates . . . From the national point of view, it is the overestimate of risk, with all the consequences involved, that has to be feared, not the actual captures, which, if the Navy is maintained at an adequate strength, and is effectively directed, will not reach such dimensions as to constitute a public danger".²¹⁵

The majority report laid stress upon the importance of the Navy. Even though the merchant or shipowner was compensated by the state for his loss, that fact would afford no relief to the nation which was deprived of its supplies because of the weakness of its Navy. And if, under existing conditions, owners and merchants were liable to meet with heavy losses, they could also look for extraordinary profits. It would be unfair to ask the taxpayer to stand the losses while permitting the individual owners to retain the profits. The uncertainty of contraband lists, the increased burden upon the Treasury, the danger of frauds, and the administrative difficulties appeared to the committee sufficient, when taken together, to exceed any advantages which a scheme of indemnity might furnish.²¹⁶ The committee was even less favorable to any system of state insurance, i. e., a system toward the cost of which owners would contribute.²¹⁷

²¹⁴ *Ibid.*, p. 8.

²¹⁵ *Ibid.*, p. 44.

²¹⁶ *Ibid.*, pp. 39-42.

²¹⁷ *Ibid.*, pp. 20-26.

Since the Second Hague Conference there has been frequent discussion in England upon the question of immunity.²¹⁸ On October 8, 1912, the London Chamber of Commerce passed a resolution favoring reform.²¹⁹ On the thirtieth of the same month a similar resolution was passed at a conference for the promotion of a better understanding between England and Germany. Professor Eiekhoff declared that Germany would be less concerned to increase her fleet if her expanding commerce were rendered secure from capture.²²⁰ Throughout 1913 the question was discussed in letters to the *Times* and in Parliament. The discussion was concerned, to a continuously greater degree, with the relation of immunity to the reduction of armaments. The inconsistency of denying an enemy ship entrance to its home port and allowing it entry into a nearby neutral port was pointed out in Parliament. The imperative necessities of war might demand capture at sea at a time when the seizure of private property on land could be dispensed with. Insurance companies might lose much business in time of war but they "recouped themselves by the high rates they charged to cover war risks." Armament would not be reduced in England because the loss of one means of injuring the enemy would induce the demand for an increased army. There would remain, moreover, the recourse to visit and search on pretense of suspicion of contraband.²²¹

The discussion was re-opened in Parliament on May 6, 1914. Mr. Morrell remarked, *inter alia*, that "having regard to the great amount of marine insurance that was done in this country it did seem absurd that the British fleet should be used to destroy commerce of which insurers here would have to pay the cost".²²² The reply of Sir Edward Grey has been characterized by M. M.

²¹⁸ See *Hansard*, (1908), 183, pp. 1127-1179; (1909), 3, pp. 1599-1639; (1910), 15, pp. 457-472; (1911), 27, pp. 445-447.

²¹⁹ *London Times*, October 9, 1912, p. 10.

²²⁰ *Ibid.*, November 1, 1912, p. 14. Sir John Macdonnell characterized as "Mahanism" that sentiment for capture which, "slurring over the moral issues and aspects of war, dwells upon its technique, and which, if it had its way, would revoke the Declaration of Paris".

²²¹ *Hansard*, (1913), 51, pp. 324-347. For comments by Professor Holland and Lord Sydenham, see *Times* (London), November 6, 1913, p. 7, and November 12, 1913, p. 7.

²²² This idea overlooks non-liability for the fulfillment of such contracts with an alien enemy.

J. Vallatton as "pas une opinion personnelle, mais le point de vue actuel du gouvernement britannique, qui paraît s'être enfin rendu compte de la nécessité de faire volteface et d'adhérer à l'abolition de la capture".²²³ The Foreign Secretary declared that England's opposition to immunity had never been irreconcilable and that foreign countries had not taken advantage of the suggestion, thrown out by the British delegates to the Second Hague Conference, to propose reduction of naval expenditure on condition of the abolition of capture. Speaking with reference to instructions to delegates to the Third Hague Conference he said that England ought not to "pose as being the champion obstacle" to reform. But England would have to demand, as conditions, understandings regarding blockade, contraband, and floating mines. While refusing to accept the motion of Mr. Morrell, expressing the desirability of negotiations with other governments upon the subject of immunity, Sir Edward Grey concluded:

"If it is understood that we must have conditions, I shall be prepared to take up the attitude that we shall not on the next occasion refuse to negotiate, but shall come forward ourselves with the actual conditions which we regard as essential and fair conditions in the matter with the possibility of a settlement".²²⁴

In May, 1914, was held in London a meeting of the Baltic and White Sea Conference of British and foreign shipowners. The President, Mr. W. J. Noble, made the assertion significant, from the viewpoint of neutral influence, that in any future naval war no belligerent could safely rely on its own mercantile marine for the conveyance of its necessary food supplies unless it was prepared to give a national indemnity. The Conference passed a resolution calling on the governments of the maritime nations to take into early consideration the question of the abolition of capture.²²⁵

It remains to take account of the treatment accorded the ques-

²²³ "De quelques conflits de coutumes de la guerre maritime" in *R. D. I.*, (1914), XVI, p. 289.

²²⁴ *Hansard*, (1914), 62, pp. 367-411.

²²⁵ *Times* (London), May 8, 1914, p. 21.

tion of inviolability in the two Hague Conferences.²²⁶ At the Conference of 1899, the letter of the Delegation of the United States²²⁷ was made the subject of a *vœu* of the Second Commission to the effect that the proposal of immunity made in that letter be placed upon the program of a later conference. The *vœu* was adopted by the Conference, Sir Julian Pauncefote, first delegate from Great Britain, abstaining from the vote on the ground of lack of instructions.²²⁸

The question was included in the Russian program for the Second Hague Conference and was submitted to the Conference by the American Delegation.²²⁹ As formulated for the consideration of the Fourth Commission the proposition of the United States read:

"The private property of all citizens or subjects of the Signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said Signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers".²³⁰

M. Ruy Barbosa, first delegate from Brazil, in a speech prefacing that of Mr. Choate, declared that the decisive question to be decided was whether or not the right of capture was essential to maritime warfare. His own reply was in the negative, according with the traditional attitude of Brazil upon the question of immunity.²³¹

The argument of Mr. Choate rested upon the doctrine which regards war as tending to become a struggle between states, concerning individuals only indirectly. Capture, he said, is a heri-

²²⁶ The question did not receive attention at the London Conference of 1908-1909. The work of that conference has, however, a direct bearing upon the prospects for immunity since a number of the articles of the Declaration of London, viz., articles 1, 18, 19, 28, 35, 40, 48, 51, 52, and 53 were framed to render nugatory the means which have been developed for evading the Declaration of Paris.

²²⁷ See chapter three of this study.

²²⁸ *Conférence internationale de la paix*, (1899), pp. 43-46.

²²⁹ *Deuxième conférence internationale de paix*, (1909), III, pp. 750-779.

²³⁰ *Ibid.*, p. 1141.

²³¹ *Deuxième conférence internationale de la paix*, III, pp. 746-750.

tage from ancient piracy.²³² To this statement M. Triana, delegate from Colombia, replied that war itself was simply organized murder.²³³ He brought the discussion back to practical considerations: "Nous cherchons", he said, "à nous approcher de l'idéal autant que possible, mais chacun de nous, dans son cas, doit subordonner ses décisions aux besoins et aux intérêts de la Nation qu'il représente".²³⁴ Sir Edward Fry, delegate from Great Britain, defended capture against the accusation of inhumanity.²³⁵ M. Nelidow of Russia attacked the argument of the American delegate, Mr. Rose, who had sought to assimilate private property at sea to that on land. M. Nelidow declared also that invasion was itself a violation of private property.²³⁶

Mr. Choate used as his second line of attack the ineffectiveness of capture as a means of deciding wars.²³⁷ He declared also that the expenditures necessitated by the policies of the naval powers condemned the maintenance of vessels destined to prey upon enemy merchantmen.²³⁸ This argument is aimed at a man of straw. As Dupuis points out, the usefulness of cruisers in attacking enemy shipping is manifested not before, but after, victorious naval operations. While sporadic attacks on commerce are futile, once naval predominance has been gained cruisers are available for use in sweeping the enemy's commerce from the seas. For the conditions in which capture is of real utility, therefore, special war vessels adapted for attack on commerce are unnecessary.²³⁹

M. Barbosa attempted to prove that through insurance the blows aimed at enemy commerce would be diverted to neutrals.²⁴⁰ Mr. Choate, viewing this phase of the question from another angle, declined to admit that the distribution of the loss

²³² *Ibid.*, p. 774.

²³³ *Ibid.*, p. 792.

²³⁴ *Ibid.*, p. 791.

²³⁵ *Ibid.*, p. 800.

²³⁶ *Ibid.*, p. 842.

²³⁷ *Ibid.*, p. 773. For an extremely well reasoned consideration of this point, concluding in a sense partially contrary to the statement of Mr. Choate, see Dupuis, *Le droit de la guerre maritime*, pp. 65-70.

²³⁸ *Deuxième conférence internationale de la paix*, III, p. 777.

²³⁹ *Le droit de la guerre maritime*, p. 72.

²⁴⁰ *Deuxième conférence internationale de la paix*, III, p. 783.

over the community by means of insurance would excite a general demand for peace.²⁴¹

M. Renault outlined the reasons which would make it impossible for the French members of the commission to vote for the abolition of capture. A preliminary settlement of the questions of contraband and blockade would be necessary;²⁴² the differing nature of land and sea warfare rendered it possible to reconcile capture with the modern theory of war, granting that which one cannot admit, that the degree of respect shown for private property on land is prompted by any other sentiment than self-interest; the apprehension of warfare on commerce, which enables a belligerent to "arrest the economic life of his adversary" may be the determining factor in preventing a war, while capture in a war once commenced may induce a more speedy capitulation; capture today is not analogous to privateering, which enriched individuals at the expense of other individuals, but is a means by which one state strikes at the vital interests of another state; finally, capture enables a state to deprive its enemy of great steamships easily convertible into auxiliary cruisers.²⁴³

Sir Ernest Satow explained the attitude of Great Britain in refusing her assent to the proposal of the United States. So long as commercial blockade was retained, there would be danger that, in retaliation for supposed infraction of the right of blockade by one belligerent, the enemy government would put capture again into operation. But that Great Britain regarded the right of capture as a corollary of the state of war was revealed in the emphasis laid upon the reduction of armaments. If immunity is to be favored by England, war must first be made less probable.²⁴⁴

The adhesion of Russia was withheld on the ground that the way to a secure agreement had not been sufficiently prepared.²⁴⁵ The Japanese delegation did not announce its reasons for not favoring the proposal. M. Larreta, for the delegates of Argen-

²⁴¹ *Ibid.*, p. 779.

²⁴² This point had been emphasized by the German delegation—*Ibid.*, p. 789—which, however, voted for the proposition of the United States.

²⁴³ *Deuxième conférence internationale de la paix*, III, pp. 792-795.

²⁴⁴ *Deuxième conférence internationale de la paix*, III, pp. 788, 822.

²⁴⁵ *Ibid.*, p. 789.

тина, pronounced an unconditional support of the right of capture.²⁴⁶

The vote upon immunity showed that twenty-one states—Germany (with reservations above noted), the United States, Austria Hungary, Belgium, Brazil, Bulgaria, China, Cuba, Denmark, Ecuador, Greece, Hayti, Italy, Norway, The Netherlands, Persia, Roumania, Siam, Sweden, Switzerland, and Turkey—were favorable. Eleven states, Colombia, Spain, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, and Salvador, voted in the negative. Chili abstained, and eleven states did not answer to the roll-call.²⁴⁷

The failure of any of the proposals to meet with success led the president of the commission, M. Martens, to propose the *vœu* that in case of future wars, the Powers engaged should follow the precedent set in 1866 and declare spontaneously whether they will, entirely or in part, renounce the right of capture during the war. Certainty, he thought, would result, and with it a diminished resistance to inviolability. The proposal was withdrawn, after being criticised as tending to infringe the sovereignty of individual states—a criticism that appears to Dupuis to lack both force and relevance.²⁴⁸

Mention should be made of the attempt to codify the customs which have been developing with regard to the treatment of enemy merchant ships at the outbreak of hostilities. The Convention of the Second Hague Conference which makes provision for the inviolability of enemy ships in the ports of the opposing belligerent or at sea at the outbreak of war is open to the criticism that the article which concerns ships in port is not mandatory, and that it leaves unsettled the number of days of

²⁴⁶ *Ibid.*, p. 810.

²⁴⁷ *Ibid.*, pp. 834-835. Brazil proposed to apply to maritime warfare the provisions of articles 23, 28, 46, 47, and 53 of the Second Hague Convention of 1899; Belgium proposed sequestration; Holland wished to exempt from capture ships bearing a passport certifying that they would not be put to military uses; France proposed the abolition of prize money and partial state indemnification; Great Britain, "animé", said Sir Ernest Satow, "du désir sincère d'alléger les neutres, dans la mesure du possible, du fardeau de la guerre", proposed the abolition of contraband. For the texts of these proposals see: *Deuxième conférence internationale de la paix*, III, pp. 1141-1144; for speech of Sir Ernest Satow, *Ibid.*, p. 788.

²⁴⁸ *Deuxième conférence internationale de la paix*, III, pp. 844-846; Dupuis, *Le droit de la guerre maritime*, pp. 82-84.

grace that should be allowed. In that the Convention emphasizes the presumption that a belligerent will prefer to requisition rather than to allow to pass without interference enemy vessels and cargoes met at sea in ignorance of the outbreak of war, it sacrifices an ideal which had already attained the dignity of practice to the desire not to demand more than was likely to be accorded.²⁴⁹

From the evidence accumulated by this study of the historical development of the theory of and proposals concerning immunity, it appears impossible to draw a clear-cut conclusion as to the present status of the question. Without doubt the majority of publicists favor immunity. But if the arguments of the advocates of reform have convinced some who previously opposed it, it is no less true that there has occurred a partially compensating extension of the list of opponents. This seems to be due to the gradually increasing tendency of theorists to base their opinions upon the facts of the situation in general and of their own countries in particular.

This partial modification of the body of favorable opinion reflects the changed circumstances which the increased attention of continental states to the importance of colonies and commerce and, in consequence, of navies, represents. Simultaneously, public opinion in Great Britain has manifested a growing fear lest the next war in which that country should become involved would be lost on account of the starvation of her people or the apprehension of starvation. That the *Report of the Royal Commission on the Supply of Food and Raw Materials in Time of War* reassured the British people on this point appears to be borne out by the unfavorable attitude of the British delegates at the Second Hague Conference toward the proposal for the inviolability of private property from capture.

Finally, it may be noted that occasional publicists and statesmen have voiced the opinion that the question of capture is bound up, not only with the questions of contraband and block-

²⁴⁹ *Deuxième conférence internationale de la paix*, I, pp. 644-646. The article of the *Convention Relative to Certain Restrictions with Regard to the Right of Capture in Naval War*, (*Ibid.*, pp. 665-666), which exempts the crews of captured enemy merchant vessels from being made prisoners, should have some influence upon the policy of nations, especially of Great Britain.

ade, but with the still more vital question of the reduction of armaments. They have pointed out that the future of immunity for private property at sea is dependent upon the future of war and peace.

CHAPTER V

PRIVATE PROPERTY AT SEA IN THE EUROPEAN WAR¹

In accordance with the plan so far followed in the treatment of the practice of nations, the purpose of this chapter is two-fold. To record the action in observance of regulations *de faveur* intended to mitigate the existing right of capture will be a comparatively short undertaking. Of greater interest and importance is the study of belligerent activity tending to extend the right of capture and to nullify laws designed to act as limitations upon that right. The principal question to be answered in the second portion of the inquiry is that which has already been asked in regard to other wars since the Declaration of Paris. Have the second and third rules of that Declaration been observed? Have they stood the test of a great maritime war, or does the latest record of fact intensify the conclusions to be drawn from the American Civil War and the Russo-Japanese War?

The attitude taken toward the practice of granting days of grace to enemy vessels in certain circumstances at the beginning of a war is of more interest than formerly because of the formulation of that hitherto varying custom in the sixth Hague Convention of 1907.² On August 4, 1914, a British Order in Council was issued in which provision was made for acting in the manner declared to be "desirable" by the "Convention Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities." To enemy merchant ships in the ports to which

¹ In this chapter the Special Supplement of the *A. J. I. L.*, 9, (July, 1915), containing diplomatic correspondence between the United States and belligerent governments will be abbreviated to *A. J. I. L.*, S. S., 1915.

² Although Servia and Montenegro have not ratified the Hague Conventions of 1907, the great Powers are professedly observing them. See the opinion of the British Prize Court in *The Mince*, in *A. J. I. L.*, 9, p. 551.

the Order applied, or which had cleared from their last port before the declaration of war, and had entered one of the designated ports, in ignorance of the war, ten days were allowed in which to load or unload their cargoes and depart. Provision was made for ships arriving after the expiration of the ten day period—provided they satisfied certain requirements. Cable ships, seagoing ships designed to carry oil fuel, and ships of over 5,000 tons gross burden or of a speed of fourteen knots or more were to be excluded from the operation of the Order, as were “merchant ships which show by their build that they are intended for conversion into warships”. Ships exempted by the Order were to be furnished with passes good only over prescribed routes.³

This Order was, however, to apply only on condition of reciprocal action by the German Government. The two short communications on the subject received from that Government appeared to expect an unconditional statement of British intention, before the German determination could be made. The result was a failure to come to an agreement and consequently to carry out the non-obligatory clauses of the Convention.⁴ Both countries are observing the second article of the Convention, detaining, but not confiscating, enemy vessels found in port when the war began; these vessels and their cargoes were to be subject only to requisition.⁵

Article three of the above-named convention was not included, even conditionally, in the British Order and was not regarded

³ Order in Council, Articles 3-8, cited in full by Bentwich, “International Law as Applied by England in the War”, in *A. J. I. L.*, 9, (January, 1915), pp. 20-21.

⁴ *Ibid.*, pp. 21-24. Canada followed the example of England. See Garner, J. W., “International Law in the European War,” in *A. J. I. L.*, 10, (April, 1916), pp. 248-249.

⁵ See “The Chile” in *A. J. I. L.*, 9, (1915), pp. 528-531. (*Times Law Reports*, 31, p. 3). The court did not finally determine the rights of the Crown nor the question whether Article 2 of the sixth Convention was dependent upon Article 1. For discussion of English cases see article by Garner, already cited, pp. 249-269. Professor Garner quotes the report of July 3, 1915, published by the British Navy League, according to which 171 German, Austrian and Turkish merchant vessels were found in British and Egyptian ports when war broke out. Subsequently 131 vessels of the three nations were seized prior to the publication of the report, the greater number of these at the beginning of the war; the total of enemy vessels captured by Great Britain up to July 3, 1915, was therefore 302.

as obligatory, as Germany had made reservations concerning it in 1907. Enemy ships which had left their home ports before war broke out and which were captured at sea in ignorance of hostilities were, therefore, confiscable and have been confiscated by British and French Prize Courts. German cruisers usually sank the prizes made under this article, while the British Prize Court interpreted the rights of the enemy under it very strictly.⁶ For the purposes of the sixth convention, territorial waters were to be regarded as "en mer," and "port" as "a place where ships are in the habit of coming to load or unload."⁷ The question whether neutral owners of property on the destroyed British vessels will receive compensation or not cannot be answered without the decisions, but compensation is hardly to be anticipated in view of continental precedents.

As between France and Germany, merchant ships, not indicating by their "construction, armament or affectation" that they were susceptible of being transformed into war vessels or used in the public service, were allowed seven days of grace in fulfillment of the first article of the convention above-named.⁸ France accorded to Austria-Hungary the same privileges.⁹ But enemy ships met at sea in ignorance of hostilities were captured, and were condemned with their cargoes, if enemy, by the French *Conseil des Prises*.¹⁰

Belgium granted three days *délai* to German merchant ships in her ports at the outbreak of war.¹¹ Presumably Germany reciprocated for this favor.

Great Britain and Austria engaged to allow ten days of grace to the ships of each in the other's ports when war began between them. Ships which did not avail themselves of the privilege of departure and ships met at sea in ignorance of hos-

⁶ Bentwich, p. 24. He says that British cruisers captured nearly one hundred German ships, the inference from the context being that the captains of the latter were ignorant of the outbreak of hostilities. As illustrative cases see "The Marie Glaeser," in *A. J. I. L.*, 9 p. 531 ff., (*Times*, L. R., 31, p. 8); "The Mowe" *Ibid.*, pp. 547-553; (*Times*, L. R., 31, p. 46.)

⁷ "The Möwe," in *A. J. I. L.*, 9.

⁸ *R. G. D. I. P.*, 22, (1915), Documents, pp. 9-10.

⁹ *Ibid.*, pp. 12-13. Presumably Austria acted reciprocally.

¹⁰ *Ibid.*, *Jurisprudence en matière de prises maritimes*. Cases of the *Porto. Barmbeck* and others, pp. 1-12. No record of Russian treatment of enemy vessels at outbreak of war has so far been available.

¹¹ Garner, p. 248, n. 21.

ILITIES were to be detained or requisitioned in lieu of confiscation.¹²

Japan alone granted, on condition that like privileges were accorded by the German Government, the same *délai de faveur*, a period of two weeks, both to vessels found in her ports and to those which entered them or were met by her cruisers at sea in ignorance of the outbreak of hostilities.¹³

As between Great Britain and Turkey, privileges were granted by neither Power, Turkey, though she inaugurated the *délai de faveur*, not having ratified the Hague Convention which codified it.¹⁴

On May 30, 1915, Italy decreed the sequestration of "all enemy merchant ships lying in the ports and territorial waters of the Kingdom and its colonies at the outbreak of hostilities" and of "those enemy merchant ships which shall have left their last port before the declaration of war, and which are met at sea before they are aware of the commencement of hostilities." Vessels found upon examination to be "intended for conversion into warships" were to be captured and placed in the Prize Court; the remainder were to be subject to requisition. Enemy goods found on board were to be "sequestered and restored after the war without an indemnity, or else requisitioned with an indemnity."¹⁵ This decree was justified in that Italy has never ratified the sixth Hague Convention of 1907.

In dealing with the effects of the application of certain rights of belligerents upon certain other rights of both neutrals and belligerents, with the purpose of discovering to what extent the present legal guarantees modifying the right of capture are effectual, it will be convenient to deal with the various belligerent countries separately, since the information available varies greatly with different countries. Fortunately the material is most readily accessible for the conduct of maritime operations by Great Britain, whose interest in the subject of our discussion has ever been paramount. Dupuis has written that the Russo-

¹² Bentwich, pp. 31-33.

¹³ Garner, p. 248.

¹⁴ *Ibid.*, p. 249.

¹⁵ *Parliamentary Paper Miscell.*, No. 18, (1915), Cd. 8104, cited in *A. J. L. L.*, 10, (April, 1916), *Supp.*, pp. 111-113.

Japanese War converted England to the standpoint of neutrals,¹⁶ and something has already been pointed out concerning the British attitude toward Russian and Japanese extensions of belligerent rights at that time. Has British practice since August 4, 1914, accorded with the British attitude in times when England has been a neutral?

A. BRITISH PRACTICE IN THE EUROPEAN WAR

The Declaration of Paris received no reaffirmation at the beginning of the war by a British Order in Council. In his address at the opening of the Prize Court, the President, Sir Samuel Evans, stated that the rules of that Declaration would be enforced. But by Order in Council of August 20, 1914, the Declaration of London was declared to be placed in operation during the present hostilities, that policy having been agreed upon by the Allied Governments in order "that the naval operations of the allied forces so far as they affect neutral ships and commerce [might] be conducted on similar principles." Certain additions and alterations were laid down by which the rules of the Declaration were weakened. On August 6, 1914, the United States Government had instructed its ambassadors at London, St. Petersburg, Paris, Berlin, and Vienna, and its minister at Brussels to inquire as to the willingness of the governments to which they were respectively accredited to agree to a reciprocal observance of the Declaration of London. On August 13 and 22 replies were received from the embassies at Vienna and Berlin stating that the governments of Austria-Hungary and Germany would observe the Declaration on the condition proposed. On August 27 Ambassador Page sent to Washington the above-mentioned Order in Council. In view of Article 65 of the Declaration of London, which provides that the Declaration must be accepted as a whole, the United States Government, on October 22 and 24 respectively, informed Berlin and London that it felt "obliged to withdraw its suggestion" and therefore it would insist "that the rights and duties of the United States and its citizens in the present war be defined by

¹⁶ *Le droit de la guerre maritime*, p. 22.

the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London."¹⁷

The exceptions introduced by the British Government which concern our study were: (1) the substitution of the British contraband list of August 4, 1914 for that contained in Articles 22 and 24 of the Declaration and (2) the abrogation of Article 35 of the Declaration by the assimilation of conditional to absolute contraband in so far as liability to capture under the doctrine of continuous transport as declared by Article 30 of the Declaration was concerned.¹⁸ Thus at the outset, the British Government showed a willingness to follow precedents which had operated in previous wars with such injury to the efficacy of the second and third rules of the Declaration of Paris as to have led to the formation of the very rules of the Declaration of London which the Allied Governments were disregarding.

Both of the above-named exceptions to the Declaration were concerned with increasing the difficulties of enemy and neutral property in reaching enemy states; the first by extending the contraband list, the second by preventing the transit of conditional contraband through neutral ports. It will be profitable to follow the practice of the two principles concurrently.

¹⁷ For correspondence and Order in Council see *A. J. I. L.*, 88., (1915), pp. 1-8.

¹⁸ Article 30 of the Declaration of London provides:

"Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails trans-shipment or a subsequent transport by land".

Article 33 provides:

"Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress".

Article 35:

"Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port". Cohen, A., *The Declaration of London* (London, 1911), pp. 102-109.

1. Contraband Lists

The Order in Council of August 20 does not offer large ground for criticism of its extension of the contraband list. Aircraft of all types were made absolute contraband, while the list of conditional contraband was left as determined by the Declaration of London.¹⁹

On September 21, 1914, there was proclaimed an extension of the list of conditional contraband by the addition of unwrought copper, lead in pigs, sheets or pipe, glycerine, rubber, hides and skins, ferrochrome, haematite and magnetic iron ores.²⁰

On October 29, 1914, the contraband list was revised.²¹ The new conditional contraband articles of the previous Order were, with the exception of glycerine and hides, made absolute contraband, and to the list were added sulphuric acid, range-finders, iron pyrites, nickel and nickel ore, aluminum, ferro-silica, barbed wire and implements for fixing and cutting the same, motor vehicles and their component parts, and mineral oils and motor spirit, except lubricating oils. The conditional contraband list was extended by the addition of sulphur and leather, undressed or dressed, suitable for saddlery, harness or military boots.

Again on December 23, 1914, the list of contraband was revised. To the absolute category were added a large number of ingredients of explosives, resinous products, several metals and ores, antimony, and submarine sound signalling apparatus. The conditional list was not extended.²²

On the 11th of March, 1915, raw wool and woolen yarn, tin and tin ore, castor oil, paraffin wax, copper iodide, lubricants, hides, skins, and leather suitable for the manufacture of military equipment were made absolute contraband.²³

While, in the main, the additions enumerated are of such importance for war purposes as to justify their being regarded as absolute contraband, many articles so listed are of considerable

¹⁹ *Proclamation*, August 4, 1914, No. 1250, in *A. J. I. L., S. S.*, (1915), pp. 9-10.

²⁰ *Ibid.*, September 21, 1914, No. 1410, in *A. J. I. L., S. S.*, (1915), p. 11.

²¹ *Ibid.*, October 29, 1914, No. 1613, in *A. J. I. L., S. S.*, (1915), pp. 12-13.

²² *Proclamation*, December 23, 1914, in *A. J. I. L., S. S.*, (1915), pp. 15-18.

²³ *Ibid.*, March 11, 1915, in *A. J. I. L., S. S.*, (1915), pp. 20-21.

use in the arts. Among these may be noted copper, rubber, rosin, oil, wool, and tin, all of them properly to be regarded as conditional contraband by a Government which has taken the leading part in establishing the distinction between the two classes of contraband.

2. Seizure of Contraband—The Grounds of Seizure

Not until March 11, 1915, did Great Britain issue her Order by which the waters surrounding German ports and designated neutral ports were to be subjected to the control of the British Navy by means which will be outlined in the discussion of blockade.²⁴ Previously to this action, and while, therefore, access to German ports was free to conditional contraband, numerous American vessels with cargoes of foodstuffs had been seized while en route to German or neutral ports and conducted into British ports. This procedure was made the principal basis of complaint in the note of Secretary Bryan of December 26, 1914.²⁵

The seizures were made upon grounds of suspicion that contraband was being transported either by means of concealment, or by the use of consignments made "to order" or otherwise, so as to disguise actual destination to a fortified place or to government contractors in enemy territory.²⁶ Thus we find immediately that the belligerent's right to prevent contraband from reaching his enemy is being exercised through the application of the coöperating principles of "continuous transport" and "visit and search." The circle is readily traced. Belligerent A cannot legally interfere, so long as a blockade has not been established, with enemy goods *per se* proceeding to enemy territory in neutral ships. His first recourse is to the extension of the contraband list. The shipowners and cargo-owners attempt to evade him by using neutral ports. His second offensive de-

²⁴ See pp. 191-201, *infra*.

²⁵ See cases, p. 184 ff., and note of Secretary of State Bryan to Ambassador Page of January 7, 1915, in *A. J. I. L., S. S.*, (1915), pp. 55-60.

²⁶ See page 168.

fence is the principle of continuous transport. He insures the effectiveness of the latter by applying it both to absolute and to conditional contraband. He further approximates the position of conditional to that of absolute contraband by erecting against it harsh presumptions of hostile destination. Finally on pleas of suspicion and of the impossibility of adequate search of modern merchantmen, belligerent A conducts the neutral vessels with their cargoes into his own ports, there to be detained until his determination as to their disposition shall be made. The possibility of encroachment upon the rights of neutrals and of the opposing belligerent (for international law must maintain those rights which it has confirmed for belligerents as well as for neutrals) is immediately apparent. But belligerent A is to be judged by what he does, not by what he could do. In attempting to understand belligerent methods, the necessity of keeping in mind the inter-dependence and inter-action of various belligerent rights in the process of the apprehension of enemy property at sea is apparent.

Before discussing the cases which arose out of the application of the British regulations, it should be noted that by a decree of January 25, 1915, the German Bundesrath unwittingly enabled the British Government to complete its defences against the introduction of the most important variety of conditional contraband into Germany. The German decree placed the supply of grain and flour within the Empire under governmental control. The decree was almost immediately altered so as to apply only to the domestic supply, leaving imported foodstuffs in private hands.²⁷ The British Cabinet, however, asserted that

"in any country in which there exists such a tremendous organization for war as now obtains in Germany there is no clear division between those whom the government is responsible for feeding and those whom it is not," and that "the reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed

²⁷ Garner, "Some Questions of International Law in the European War, VI." in *A. J. I. L.*, 9, (April, 1915), p. 384.

forces or enemy government disappears when the distinction between the civil population and the armed forces itself disappears".²⁸

The Cabinet was thus taking the position that the German decree had recognized the necessity of conserving the supply of flour and grain and that this recognition justified Great Britain in regarding foodstuffs as absolute contraband. Probably this action would have been taken without the decree of the Bundesrath since the British Government had adopted measures of a similar nature and since the basis of the act is the recognition of altered circumstances.²⁹

3. Seizure of Contraband—The Cases Prior to March 1, 1915

The seizures of absolute and conditional contraband in neutral vessels found in the belligerent's ports or on the high seas at the outbreak of war, when the owners were ignorant of the outbreak of hostilities, were dealt with in accordance with Article 43 of the Declaration of London, the cargoes being condemned, subject to the payment of compensation.³⁰

The cases, which have been published, involving interference by Great Britain with neutral vessels and their cargoes prior to March 1, 1915, may be most conveniently treated in two categories: (1) those involving voyages to enemy ports, (2) those involving voyages to neutral ports. Under the first heading the single important case is that of the *Wilhelmina*.

(1) The *Wilhelmina*, an American merchantman, left New York for Hamburg on January 22, 1915, with a cargo of foodstuffs. On February 11, she was arrested at Falmouth, England, into which port she had entered of her own accord two

²⁸ Note of Sir Edward Grey to Ambassador Page, February 10, 1915, in *A. J. I. L., S. S.*, (1915), p. 80. The Report that accompanies the Declaration of London justifies the provision of Article 33 by which destination "for the use of . . . a government department of the enemy State" is declared sufficient to render conditional contraband liable to capture: "The State is one, though it necessarily acts through different departments. If a Civil Department may freely receive foodstuffs or money, the Department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased". See Bentwich, N., *The Declaration of London* (London, 1911), p. 70.

²⁹ *Times*, London, August 6, 1914, p. 6; August 11, 1914, p. 3.

³⁰ Bentwich, *A. J. I. L.*, 9, January, 1915, p. 42.

days earlier. The owners of the cargo refused to consent to its being discharged, hence the ship, which otherwise would have been released, was detained. It was at first desired to make a test case of the situation, but this was prevented by the British Order in Council of March 11, 1915.³¹ The British contentions as explained by Sir Edward Grey on February 19, 1915, were (1) that the German decree of January 25, above noted, created a situation such that a cargo of foodstuffs consigned to Germany was in reality consigned to the German Government and (2) that the cargo was en route to a fortified place.

The second contention seems clearly a subterfuge. The first one is important. At first glance it appears to overturn the principle at the base of the distinction between absolute and conditional contraband. But further study leads to the realization that the British contention simply takes account of changed conditions, this transformation consisting in the fact that government control of all foodstuffs in time of war, coupled with rapidity of communication, renders it impossible to say what imports will get to the army and what will go to civilians. And if that point could be determined, there is the further fact that the obtaining of imports of food by the civilian population simply releases more of the domestic supply for military use.³²

The case of the *Wilhelmina* was settled through diplomatic channels. The British Government purchased the cargo, paying the profit that the claimants would have received had their cargo reached its intended market, and adding an indemnity for the delay caused to the ship, so far as the authorities were responsible for it.

(2) Of the cases of neutral vessels captured en route to neutral ports, the twenty-five cases decided in the British Prize Court concurrently on September 16, 1915, serve as examples of the attitude taken toward conditional contraband by the British Prize Court.³³

The cases arose in respect of some 32,312,000 pounds of lard

³¹ See *postea*, p. 144.

³² This contention carried to a conclusion suggests that foodstuffs will be made absolute contraband by international agreement unless contraband is abolished.

³³ *Judicial Decisions*, British Prize Court, in *A. J. I. L.*, 9, (October, 1915), pp. 979-1005.

and meat products, a portion of the total cargoes, amounting to about 73,237,000 pounds, and including wheat, rubber, hides, oil stocks, lard, meat products, etc., contained in four neutral vessels. The vessels were thus described:

Alfred Nobel, Norwegian, Sailed Oct. 20, 1914—Captured Nov. 5, 1914
B. Bjornson, Norwegian, Sailed Oct. 27, 1914—Captured Nov. 11, 1914
Fridland, Swedish, Sailed Oct. 28, 1914—Captured Nov. 10, 1914
Kim, Norwegian, Sailed Nov. 11, 1914—Captured Nov. 28, 1914

In each case the intended voyage was from New York to Copenhagen.

The Court, in dealing with the conditional contraband for which claims had been set up, noted first the enormously increased imports of foodstuffs to Copenhagen since the beginning of the war; e. g.,

"the average annual quantity of lard imported into Denmark during the three years 1911 to 1913 from all sources was 1,459,000 pounds. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 pounds. . . . the imports of lard from the United States . . . to Scandinavia . . . during the months of October and November, 1914, amounted to 50,647,849 pounds as compared with 854,856 pounds for the same months in 1913 . . . In the five months, August to December, 1913 the exports of lard from the United States of America to Germany were 68,664,975 pounds. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 pounds".

The issues which concerned the cargoes of the first three ships were decided in accordance with the generally accepted rules of international law, the Order in Council of August 20, 1914, having been repealed by that of October 29, 1914, issued after those vessels had sailed. The latter Order was applied to the cases which involved the cargo of the *Kim*.

Deciding first the nature of the cargoes of foodstuffs, the Court found that "all the foodstuffs were suitable for the use of troops in the field."

The second point decided depended upon the doctrine of continuous voyage, a doctrine "familiar to international law." The Declaration of London was criticised for its compromise upon the application of the doctrine: "As is usual in compromises, there seems to be an absence of logical reason for the ex-

elusion [of conditional contraband from the application of the doctrine].” The court said with great reason:

“If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy government or its armed forces?”

Pronouncing the doctrine of continuous voyage a part of the law of nations, the Court held that

“the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real *bona fide* place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination”.

The third and final point concerned the question of ultimate destination; whether that was intended to be the German Government and its troops, or the civilian population. The onus of proof was held to lie upon the owners. The Court held that the “probable ultimate destination in fact of the cargoes” was “the German Government and their forces, for naval and military use,” dwelling upon the note of Sir Edward Grey mentioned above and quoting the German case of *The Maria*.³⁴

The Court allowed the claims in eight cases, and disallowed them in the remainder. The claims allowed were those in which an actual Danish destination was proved.

The central point in all these cases as in the case of the *Wilhelmina* is the application of the theory by which conditional contraband en route to enemy territory is made confiscable as being actually intended for the government and military forces of the enemy. The theory is again rested upon the German decree of January, 1915, and is made possible of application by casting the burden of proof upon the claimants. The control of the German Government over all German purveyors of food-

³⁴ See *postea*, p. 162.

stuffs makes the argument one difficult to combat and demands of international law that it take account of the new conditions.

In the majority of the cases which had been decided prior to the American note of December 26, 1914, the grievance of which the American Government complained was not the British classification of contraband but the prolonged delays caused by the policy of bringing vessels into British ports for search. These delays further aggravated the situation brought about by detention of neutral vessels on suspicion that the shipments had a belligerent destination. The American note pointed out that

"the effect upon trade in these articles between neutral nations resulting from interrupted voyages and detained cargoes is not entirely cured by reimbursements of the owners for the damages, which they have suffered, after investigation has failed to establish an enemy destination. The injury is to American commerce with neutral countries as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets".³⁵

The allegations of the reply of Sir Edward Grey, already alluded to, afford some support for the British practice in detaining neutral cargoes.³⁶ It will be sufficient here to note that the difficulties which arise under modern conditions in the application of the right of search had been discussed before the war and that certain proposals had been made looking toward some system by which officials of the neutral or belligerent government might certify to the contents of the cargo, thus placing the entire risk upon the owners of contraband. Sir Edward Grey expressed a wish that an "arrangement by which mistakes can be avoided"³⁷ might be found, but tentative efforts made by the United States Customs officials met with failure.³⁸

4. The Control of Enemy Trade

The above title appears appropriate to this section in which it is proposed to discuss the situation created by the British

³⁵ Note of Secretary of State Bryan to Ambassador Page, in *A. J. I. L., S. S.*, (1915), pp. 55-60.

³⁶ Reply of Sir Edward Grey, *Ibid.*, pp. 60-65.

³⁷ *Ibid.*, p. 65.

³⁸ Garner, J. W., "International Law in the European War" in *A. J. I. L.*, 9, (April, 1915), p. 381 and notes 17, 18.

Order in Council of the 11th of March, 1915. Two distinctions must be pointed out, the first substantive, the second procedural.³⁹ The first distinction is that between the situations existent before and after March 15, 1915; the second distinction, that between the situation after March 15 and that which would have been created had the Order of March 11 provided for the traditional commercial blockade.

The first distinction is readily understood; whereas before the Order of March 11 neutral vessels had been free to enter German and adjacent neutral ports, subject to the regulations against contraband, after that Order went into effect all merchant vessels which had sailed after March 1, 1915, for German ports were required, unless they were given passes enabling them to proceed to a named neutral or allied port, to discharge their cargoes in a British or allied port, to be dealt with by the British Prize Court. The same rule was to apply to all merchant vessels sailing from German ports. And all merchant vessels which had sailed since March 1 from neutral ports for other than German ports, carrying goods either of enemy origin, or to an enemy destination, or which were enemy property, might be required to discharge such goods in a British or allied port. That is, after March 15, 1915, no neutral merchant vessel might enter any German port; no neutral merchant vessel might enter any other than German ports if she was carrying enemy goods of any description.⁴⁰

The second distinction was one of procedure. In order to relieve neutrals from the consequences of the blockade, captured ships and their cargoes not contraband were not to be confiscated but were to be restored, if not requisitioned for the use of His Majesty. That is, a complete blockade was declared against German ports; but this blockade was moderated to the extent that neutral ships and their innocent cargoes were not to be con-

³⁹ For text of this Order see *A. J. I. L., S. S.*, (1915), pp. 109-112.

⁴⁰ A special arrangement was made by which cotton shipments which complied with certain requirements were "allowed free (or bought at contract price if stopped)" up to the 31st or the 16th of March, according to circumstances. The claims of American shippers under this arrangement appear to have been adequately protected by the British Prize Court. See *Note of Ambassador Page to Secretary of State ad interim*, June 22, 1915, in *A. J. I. L., S. S.*, (1915), pp. 142-143.

fiseated; while a partial blockade, a blockade against all enemy goods, with the same moderation in the penalties, was declared in respect to neutral ports on European waters, including the Mediterranean.

The procedure which was provided for cases in which neutral ships were taken carrying enemy goods *from* an enemy or neutral port differed from that provided for cases in which neutral vessels were taken carrying enemy goods *to* an enemy or neutral port in that in the former class of cases goods might be sold as well as detained, while in the latter, provision was made only for restoration to the claimant or for requisition. However, if in the former class of cases it could be shown that the goods had become neutral property before the issue of the Order, the owner might take steps to have the proceeds of the sale paid to him.

By this Order Great Britain completed the structure of her system for the control of the trade of Germany, basing her action upon the right of retaliation for the submarine practice inaugurated by Germany on February 18, 1915. We have already pointed out the effects of the British extension of the contraband list so as to include even foodstuffs; of the application of the doctrine of continuous voyage to both classes of contraband; of the creation of new presumptions as to destination of conditional contraband; and of the thorough execution of the right of visit and search. With the Order of March 11, 1915, the climax was reached by the interdiction of all commerce between neutral states and Germany.

On March 30, 1915, the Government of the United States made certain observations upon the Order, which may be summarized as:

(1) The Order denies, with small qualification, the sovereign rights of neutrals, by creating new exceptions to those rights based upon the existence of a state of war.

(2) The belligerent has not the right to forbid the carriage of *innocent* goods to its enemies via neutral ports, even though the enemy's ports be blockaded. To assert the contrary is to deny that free ships make free goods, as laid down in the Declaration of Paris.

(3) A blockade of neutral ports cannot be in conformity with the established rules of war; therefore if the cordon blockading

German ports be extended across the entrances to neutral ports free admission and exit must be accorded to *all lawful traffic* with those ports through the blockading cordon. Unlawful traffic could be discovered, as before, by visit and search.

(4) As Scandinavian and Danish ports are open to trade with German Baltic ports, a British blockade is likely to operate with unequal severity upon neutral countries.⁴¹

In one paragraph only does the Secretary of State appear to strike a note inconsistent with the general tone of the communication. In that paragraph

"the United States takes it for granted that the approach of American merchantmen to neutral ports situated upon the long line of coast affected by the Order in Council will not be interfered with when it is known that they do not carry goods which are contraband of war or goods destined to or proceeding from ports within the belligerent territory affected."

Apparently this suggestion was made with the object of restricting as far as possible the interference with neutral ships while not admitting the legality of the proposed British measures.

The firmness with which the second rule of the Declaration of Paris is upheld, together with the willingness manifested to take a sane view of military necessities in the modern application of blockade, renders this note remarkable.

The note of the British Government dated June 22, 1915, explains that in deference to the interests of American importers goods of enemy origin had been allowed, by various extensions, and in special circumstances, to leave neutral ports for the United States, and that, if express conditions were complied with, new cases might be considered through diplomatic channels.⁴²

On July 15, 1915, the State Department instructed Ambassador Page to protest to the British Foreign Office in regard to the case of the *Neches*. This ship, the note stated, of American registry, had been seized while proceeding from Rotterdam for the United States and had been ordered to discharge cargo, the

⁴¹ Note of Secretary of State Bryan to Ambassador Page in *A. J. I. L., S. S.*, (1915), pp. 116-122.

⁴² Ambassador Page to Secretary of State *ad interim*, in *A. J. I. L., S. S.*, (1915), pp. 141-146.

property of American citizens, which had originated in Belgium, enemy-occupied territory. The Department reiterated its position as to the invalidity of the practice of Great Britain in attempting to prevent a neutral from trading with another neutral, or with a belligerent where contraband was not involved.⁴³

On July 24, 1915, Sir Edward Grey set forth the argument in justification of the Order in Council of March 11, 1915. His main points were:

(1) The British blockade was simply an adaptation of old principles to a new situation.

(2) The American contention that trade through neutral ports (in non-contraband goods) with belligerents must not be interfered with was unsustainable in law or equity. "His Majesty's Government are unable to admit that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective."

(3) During the Civil War the Federal Government applied the doctrine of continuous voyage to commerce between neutral countries and neutral territory neighboring the territory of its opponent, in order to prevent the export of cotton and the import of contraband by the Confederate Government.

(4) Great Britain was "interfering with no goods with which [she] would not be entitled to interfere by blockade if the geographical position and the conditions of Germany at present were such that her commerce passed through her own ports."

(5) The War had so increased the opportunities for American commerce as to have compensated for the loss of the German and Austrian markets.⁴⁴

The striking fact regarding this note is that it sustained the British Order in Council of March 11, 1915, upon alleged legal grounds. According to Sir Edward Grey a belligerent has the

⁴³ Secretary of State to Ambassador Page, *Ibid.*, pp. 154-155. On July 31, 1915, the Foreign Secretary replied to the American note, sustaining the legality of the seizure but agreeing to consider special circumstances if such consideration were to the interest of neutrals.

⁴⁴ Ambassador Page to the Secretary of State, in *A. J. I. L., S. S.*, (1915), pp. 157-161.

right under modern conditions to render effectual the blockade of his enemy's ports by subjecting the commerce of adjacent neutral ports to supervision. Great Britain was not blockading neutral ports since neutral countries were being allowed to import what they could prove was for their own consumption. British naval vessels were acting as had Federal naval vessels in the American Civil War, seizing enemy goods en route to neutral ports but actually destined to enemy territory then under blockade. The difference in British and Federal practice was not, he contended, one of principle but of extent of operation and degree of effectiveness.

Sir Edward Grey's argument is unimpeachable in its statement of the consequences of the geographical position of Germany with relation to certain neutral ports. A blockade of German ports while Rotterdam and Copenhagen remained open to German commerce would have been a farce.

The legal problem is less simple of resolution. Great Britain has the unquestioned right to blockade the ports of Germany. She has the right, based upon American precedents, to apply the doctrine of continuous transport in order to prevent evasion of her blockade. Blockade means the prohibition of all trade, not simply of contraband trade. In the case of the *Springbok* there is doubt as to whether the decision turned at all upon the question of contraband.⁴⁵ The United States therefore is in a peculiarly embarrassing position from which to criticise the British system for control of trade. She herself is mainly responsible for the development of the doctrine of continuous voyage.

We must not, of course, overlook the fact that American courts have never applied the doctrine to non-contraband or conditional contraband goods consigned to a neutral port but destined to reach hostile territory by transportation *overland*. The case of the *Peterhoff*, discussed on pages 67-68 *infra* proves this point incontrovertibly. They have gone no further than the dictum of the *Springbok* case, which declared that any sort of goods were confiscable if destined to a blockaded port, whether they were to pass through an intermediate neutral port or not.

⁴⁵ See pp. 66-67 *infra*, for discussion *Springbok* case.

Without question Chief Justice Chase was speaking only of transportation entirely by sea. And the trend of opinion since that time is recorded in Article 19 of the Declaration of London which provides: "Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port." In a concluding chapter it will be useful to inquire whether this Article or the present British practice is the more reasonable development in view of the character of modern warfare.

It might not unreasonably be asked why, when Great Britain had already adopted the practice of regarding foodstuffs as absolute contraband, it was necessary for her to enforce a policy by which the continuous transport principle could be applied to *all* German goods. The answer is that, recognizing the relationship between German trade and German military strength, Great Britain has undertaken to destroy German trade. So long as Germany could export valuable cargoes of dyestuffs and other articles to the United States she could create credits there against which she could draw in payment for the means of carrying on the war. Further, Great Britain hopes to depress German trade to the point where the depression will be felt by the whole nation. That her policy is assisting to destroy the credit of Germany is indicated by the fall in exchange value of the mark.⁴⁶

An observation was made in Chapter I of this study to the effect that Great Britain's present plan for the control of enemy trade could be compared to the system she designed with a similar object in the struggles with France a century earlier. The two systems are alike in that they both may be regarded as attempts to control all commerce with the enemy. In the years of the Berlin and Milan Decrees and of the retaliatory Orders in Council it was lawful to capture enemy goods in neutral ships. Moreover, on account of transportation difficulties, neutral ports were of small value to a belligerent. So that it is probable that Great Britain would not have made use of the

⁴⁶ *New York Times*, July 19, 1916, p. 12. On July 19, 1916, four German marks were worth only 72.87½ cents whereas their value in ordinary times is 95.28 cents.

doctrine of continuous transport (which had already been evolved for colonial commerce) at that period, even had there been any neutral ports of importance upon which to practice it.⁴⁷ But today rapid communications bring Scandinavian and Dutch ports within a few hours journey of German markets. At the same time the Declaration of Paris intervenes to prevent arrest of non-contraband cargoes in neutral vessels and the result is a new system built about the nucleus afforded by the doctrine of continuous voyage.

The encouraging element of the present British system finds expression in the fourth paragraph of Sir Edward Grey's note to the State Department, accompanying the Order in Council of March 11, 1915:

"His Majesty's Government have felt most reluctant at the moment of initiating a policy of blockade to exact from neutral ships all the penalties attaching to a breach of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral sea-borne commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory".⁴⁸

This provision deprives the Order of much of its severity, in appearance at least. To Great Britain the power of requisition is preserved, while the neutral shipowner and the neutral and enemy cargo-owners lose only their accustomed markets. To the second rule of the Declaration of Paris, practically abrogated by the doctrine of continuous voyage, the above-named provision restores a portion of its effectiveness. The encouraging feature of this relaxation of the traditional consequences of breach of blockade is the evidence it affords that belligerents have felt the necessity for compensating neutrals even when they regarded their measures of restriction as justifiable developments to meet new conditions.

⁴⁷ She did not attempt to enforce such a rule over commerce entering Swedish ports.

⁴⁸ *A. J. I. L., S. S.*, (1915), p. 110. This, of course, leaves to Great Britain the right to confiscate contraband and vessels whose cargoes are mainly contraband, since this right exists independently of blockade.

B. GERMAN PRACTICE IN THE EUROPEAN WAR

Germany, in common with the other belligerent countries during the present war, has, in theory, observed the Declaration of Paris. That body of rules has, without proclamation, been regarded as binding upon all nations and may be considered as definitely a part of international law. After the failure of her opponents to agree to reciprocal action in placing the entire Declaration of London in force Germany took no further action in that direction.

The beginning of the war saw the frequent hypothesis of British and continental publicists realized in fact. England and Germany were opponents in maritime warfare. England had the advantages of alliance with other maritime powers of considerable strength and of the assistance of those powers in preventing importation through other territory into Germany. Nevertheless the opportunity was afforded to test the value of the arguments which those who feared the effects, direct and indirect, of attacks by German cruisers upon British commerce had adduced in support of the contention that England's interests would be better served by the abolition of the right of capture than by its retention.

The navy of Germany was second only to that of Great Britain. British commerce in 1913 totalled nearly a billion and a half sterling.⁴⁹ To undermine England's fighting capacity by striking at her commerce was to Germany a desideratum second only to the destruction of the British navy. The German "system" (if one may use that term in this connection) for the crippling or destruction of British foreign trade, if it does not present the steady development in design and effectiveness noted in the British measures, is not less interesting or less novel.

1. The Contraband Lists and Continuous Voyage

The first lists of contraband published by the German Government were those constituting Articles 22 and 24 of the Declaration of London and incorporated in the German Prize Ord-

⁴⁹ *Statesman's Year Book*, 1914, p. 73.

nance printed in Reichsgesetzblatt, 1914, No. 4.⁵⁰ On October 22, 1914, the State Department at Washington was informed that copper and lead had been added to the German list of conditional contraband.⁵¹ On November 19 "all rough or unworked lumber" was also added, with the exception of certain woods not likely to be used as fuel.⁵² On November 23 the list of conditional contraband was further extended by the addition of woods of all kinds, rough or worked, cylinder tar, sulphur, and sulphuric acid.⁵³ Nickel and aluminum were added on December 14, 1914.⁵⁴

On April 18, 1915, was published Reichsgesetzblatt No. 49, declared to be "in retaliation of the regulations adopted by England and her allies," which provided for certain amendments of the German Prize Ordinance of September 30, 1909, and placed the amended Ordinance in force. The new lists contained twenty-two denominations of absolute, and twenty-one of conditional contraband. To the articles under the former heading listed in the Declaration of London were added rangefinders, field glasses and nautical instruments, lead, barbed wire and implements therefor, tinplate, submarine sound signaling apparatus, aircraft of all kinds, lathes, mining lumber, coal and coke, and flax. The articles added as conditional contraband were: wool and woolen yarns, rubber tires for motor vehicles, rubber and gutta percha, sulphur, sulphuric acid, nitric acid, various ores and metals, antimony, various ferro-alloys, leather suitable for military purposes, tanning materials, and lumber other than that made absolute contraband.⁵⁵ Thus, although these lists were composed after those of the British Order of March 11, 1915, such important articles as wool, leather, nickel, and copper, which appeared as absolute contraband on the British lists, were left as conditional contraband in the German categories. On the other hand articles especially important to the military operations of Germany's enemies, such as coal and coke and ma-

⁵⁰ Ambassador Gerard to the Secretary of State, in *A. J. I. L., S. S.*, (1915), pp. 37-38.

⁵¹ *Ibid.*, pp. 38-39.

⁵² *Ibid.*, p. 39.

⁵³ *Ibid.*, p. 39.

⁵⁴ *Ibid.*, p. 42.

⁵⁵ *Ibid.*, pp. 43-46.

chinery for the manufacture of munitions of war, appeared on the German list of absolute contraband and not upon the British. These obvious facts evidence one of the difficulties in the way of establishing universally acceptable contraband lists. What one country needs another country has. And they add point, also, to the situation previously recognized, in which the organization of the entirety of a state's resources for war enables a belligerent readily to find reason for transferring an article from one category to another.

Article 33 of the German Ordinance set up the same presumptions of destination to the government or military forces of the enemy as had been established previously for the British prize court.

Article 35 provided that "articles of conditional contraband are liable to seizure only on a vessel en route to territory belonging to or occupied by the enemy, or to the armed forces of the enemy, and when such vessel is not intended to unload these articles in an intermediate neutral port". This provision, which applies the rule of the Declaration of London exempting conditional contraband from capture under the doctrine of continuous voyage, was modified to the extent that if "the goods are consigned to order, or the ship's papers do not show who is the consignee, or the goods are consigned to a person in territory belonging to or occupied by the enemy", or "if the vessel is bound for a neutral country with regard to which it is shown that the enemy government draws articles of the kind in question from that country", the provision was not to apply.⁵⁶

Thus, whereas the British Government had ordered the application of the doctrine of continuous voyage to conditional contraband and had later moderated that order so that it should apply only to situations "where it [was] shown to the satisfaction of one of his Majesty's Principal Secretaries of State that the enemy Government [was] drawing supplies for its armed forces from or through a neutral country", the German Government provided for the general application of the rule of the 35th article of the Declaration of London and then created such exceptions to the application as to bring into effect the same regula-

⁵⁶ *A. J. I. L., S. S.*, (1915), pp. 43-46.

tions as Great Britain had developed, previous to her blockade order of March 11, 1915.

2. The Destruction of Shipping

The cardinal feature of the German system for the control of enemy foreign trade during the present war has been the practice of destroying merchant vessels, both neutral and enemy, at sea.

For the destruction of merchant ships to have the warrant of legality, conditions of undoubted military necessity must exist. These conditions are variously interpreted in different countries, but are universally recognized. There appears to be some tendency to consider that two degrees of necessity may exist, one for the destruction of enemy, the other of neutral vessels. But any distinction of this sort must be purely artificial, since the term "necessity" has by nature no other connotation with respect to the sinking of neutral than of enemy vessels. The opinion of many publicists that the destruction of neutral ships is always illegal has not received the support of judicial decisions.

For a belligerent whose home and colonial ports are blockaded and who is faced with the present tendency unfavorable to reception of prizes in neutral ports, the practice of destroying prizes appears to have replaced that of bringing them in. Although compensation must be paid for the unlawful destruction of neutral vessels and non-contraband goods, enemy or neutral, on board, the lengthened lists of contraband and the rule that renders the neutral carrier of a particular proportion of contraband subject to confiscation decrease the liabilities that may arise from a policy of indiscriminate destruction.

The definite requirement of visit and search constitutes a condition to be satisfied before destruction which may not be neglected even in the presence of the direst military necessity. This requirement remains in spite of the fact that its execution has increased in difficulty with the increased dimensions of steamships. The fact that it is of greater importance as applied to neutral ships does not alter the absolute character of the rule in all cases. And it is not entirely one-sided in effect, since it

operates in the belligerent's favor by providing a sanction against the use of neutral flags by enemy vessels.

Although enemy vessels have not the same legal protection against destruction as restrains belligerent conduct toward neutral vessels, the observance or non-observance of the rule of military necessity, which applies to enemy as well as to neutral ships, has its bearing upon the question of immunity. As was pointed out in the discussion of the Russo-Japanese War⁵⁷ a belligerent conducting naval operations in an area far from his home or his colonial ports is unlikely to hesitate at interpreting the doctrine of military necessity in the sense most favorable to himself. The poorly-defined distinction in international law between the circumstances which justify the destruction of enemy vessels and of neutral vessels tends to draw upon the latter the fate of the former.

It is essential to a clear judgment upon the question of destruction that the conflict between the legal rights of a neutral to transmit his goods in enemy bottoms and to transmit enemy goods in his bottoms and the legal rights of a belligerent to destroy enemy ships and neutral ships be kept in mind. It is the same conflict involved in capture, the difference being one not of principle but of degree of injury to the innocent owners, since, where destruction takes place, compensation is not obligatory in all cases in which confiscation would not result from capture, and the payment of compensation is less likely to approximate the injury which the owners have suffered than is the return of the goods with damages.

The problem involved in the practice of destruction is more acute as touching neutral vessels because of their immunity from capture *per se* and of the necessity that the belligerent establish a guilty connection on their part with the enemy before he may consider whether circumstances of military necessity exist to justify destruction. Furthermore, while the destruction of enemy vessels is illegal, except in more or less definitely recognized circumstances, there is lacking the effective sanction against such destruction which is present in the obligation to compensate for illegally destroying a neutral vessel and in the

⁵⁷ See *infra*, p. 42 ff.

resentment of neutral nations where neutral vessels are concerned.⁵⁸

The problem in this portion of our study is twofold, and each side of the problem has its corollary. The four questions to be answered are:

(1) Has Germany observed the rules of law which concern the destruction of enemy merchant ships?

(2) Has Germany observed the rules which concern the destruction of neutral merchant ships?

(3) Has the submarine proved its capacity for effective action as a legal means for the destruction of enemy merchant ships?

(4) Has the submarine proved its capacity for effective action as a legal means for the destruction of neutral merchant ships?

If the answers found for these questions take proper account of the facts, they should determine whether the German practice in the present war has advanced or retarded the progress of immunity and they should point toward a desirable method for dealing with the problem of destruction in modern maritime warfare.⁵⁹

Although isolated instances of the destruction of enemy merchant vessels had occurred during the first months of the war, it was not until February 4, 1915 that Germany announced her "system" for cutting off British commerce.⁶⁰ That system was outlined as follows:

"The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of

⁵⁸ This resentment is of course present with regard to the destruction of enemy vessels where neutral lives are endangered, but this point has a more direct bearing upon particular methods of destruction than upon destruction itself. And the resentment aroused in neutral owners of cargo upon destroyed enemy vessels lacks the sanction afforded by the requirement of compensation.

⁵⁹ The indiscriminate use of submarine mines, though at first more essentially a part of the German than of the British system was very soon made a barrier to the passage of ships across the North Sea by England's War Zone Order of November 3, 1914; see ed., *A. J. I. L.*, 9, April, 1915, p. 463. This practice is patently a lawless procedure, and of doubtful influence in comparison with the other methods which the present war has developed. At best mines can only form an auxiliary means of warfare.

⁶⁰ Up to the end of 1914, 162 steam and sailing vessels of all nations had been destroyed by mines and war vessels. *Hazell's Annual* (1916), p. 279.

war, and after the 18th instant all enemy merchant vessels encountered in these waters will be destroyed, even if it may not be possible always to save their crews and passengers.

"Within this war zone neutral vessels are exposed to danger since, in view of the misuse of neutral flags ordered by the Government of Great Britain on the 31st ultimo and of the hazards of naval warfare, a neutral vessel cannot always be prevented from suffering from the attacks intended for enemy ships".⁶¹

This proclamation, which not only assumed the existence of military necessity justifying the destruction of all enemy merchant vessels met within the waters surrounding Great Britain but threatened neutral vessels with the same treatment, was declared by the German Government to be a form of "retaliation" against the measures taken by England in violation of international law, to stop all neutral sea commerce with Germany.⁶² Thus, at the beginning of her submarine campaign Germany virtually admitted the illegality of her methods.

The State Department on February 10, 1915, protested against the German decree on the ground that in the absence of blockade a belligerent had no right to proceed against a neutral ship except after visit and search.⁶³

On February 16, the German Foreign Office replied with a more elaborate exposition of the alleged illegal measures which Great Britain had taken to cut off Germany's food supplies. The particular grievance was the treatment of foodstuffs as absolute contraband. The German note carried the clear inference that the United States had been willing to submit to illegal treatment of their trade with Germany by the Entente powers, though it did not charge a technical departure from neutrality. It pointed out "very particularly and with the greatest emphasis, that a trade in arms exists between American manufacturers and Germany's enemies which is estimated at many hundred million marks". This second argument illustrates the retaliatory nature of Germany's action, since the German Government

⁶¹ *Proclamation in A. J. I. L., S. S., (1915), pp. 83-84. Translation as quoted in editorial, A. J. I. L., 9, (April, 1915), p. 465.*

⁶² "Memorial of the Imperial German Government", in *A. J. I. L., S. S., (1915), pp. 84-85.*

⁶³ The Secretary of State to Ambassador Gerard, in *A. J. I. L., S. S., (1915), pp. 86-88.*

"rely on the neutrals who have hitherto tacitly or under protest submitted to the consequences, detrimental to themselves, of England's war of famine to display not less tolerance toward Germany, even if the German measures constitute new forms of maritime war, as has hitherto been the case with the English measures".

Two paragraphs of this note appear inconsistent with one another. In one "the presumption will prevail, even in the case of neutral ships, that they have contraband on board, in view of the interpretation of the idea of contraband in which the English Government have indulged as regards Germany and which the German Government will accordingly apply against England". In the other "naturally the Imperial Government are not willing to waive the right to establish the presence of contraband in the cargoes of neutral ships and, in cases requiring it, to take any action necessary on the grounds established".⁶⁴ The former of these statements would lead to the supposition that neutral vessels would be sunk on sight, the latter appears to recognize the necessity for visit and search.

The German Government also pointed out that the British Admiralty was encouraging the use of neutral flags by British merchant vessels, and added that the armament of a merchant ship was the chief obstacle preventing the practice of visit and search. This acknowledgment of the difficulty of using the submarine in accordance with the known rules of warfare was emphasized in the reply of the German Foreign Office on March 1, 1915 to the American proposal of February 20, regarding a *modus vivendi* for the belligerents.⁶⁵ The German note ad-

⁶⁴ For text of note see *A. J. I. L., S. S.*, (1915), pp. 90-96.

⁶⁵ The Government of the United States proposed that both Germany and Great Britain agree: (1) not to sow any floating mines nor to plant any anchored mines on the high seas except within cannon range of harbors, for defensive purposes only; (2) not to use submarines against any merchant ships except "to enforce the right of visit and search" and (3) to forbid the use of neutral flags by their respective merchant vessels "for the purpose of *disguise or ruse de guerre*". It was further proposed that Germany should permit the establishment of American agencies in Germany for the distribution of foodstuffs to the civilian population through licensed German retailers. To Great Britain it was proposed that she do not place foodstuffs on the contraband list nor interfere with their shipment to the American agencies in Germany. See text of note in *A. J. I. L., S. S.*, (1915),

mitted the willingness of the government to restrict the use of submarines, but this restriction was to be

"contingent on the fact that enemy mercantile (*sic*) abstain from the use of the neutral flag and other neutral distinctive marks. It would appear to be a matter of course that such mercantile also abstain from arming themselves and from all resistance by force, since such procedure contrary to international law would render impossible any action of the submarines in accordance with international law".⁶⁵

The failure of the American proposal was followed by the initiation of the German measures for the "blockade" of the United Kingdom. As already noted the destruction of enemy merchant vessels by torpedoes fired from submarines had begun before February 18, 1915, but until January 30 of that year only one enemy merchantman carrying non-combatant passengers, the French *Amiral-Ganteaume*, had been sunk without warning and visit.⁶⁷ On the latter date two British merchant vessels, the *Taku Maru* and the *Icaria* were sunk in the North Sea without visit and without provision having been made for the safety of the crews, whereas two others, the *Linda-Blanche* and the *Ben-Cruachan* were sunk in the Irish Sea after their papers had been examined and time had been allowed the crews to take to the boats.⁶⁸

With the expiration of the fortnight's delay granted by the German proclamation of February 4, 1915, the number of enemy vessels reported sunk increased and neutral vessels also were destroyed. On April 9, 1915 the London *Times* announced that thirty-three British merchantmen had been sunk between the dates of February 18, 1915 and April 7, 1915, an average of about five per week. An appreciable number of merchantmen flying the Dutch, Danish, Swedish, and Norwegian flags were

pp. 97-99. Germany refused to give up entirely the use of mines for offensive purposes or to desist from submarine attacks on commerce except under the conditions noted above. Great Britain therefore declined to discontinue her restrictive measures against the food supply of Germany. For British reply see *A. J. I. L., S. S.*, (1915), pp. 106-109.

⁶⁵ *A. J. I. L., S. S.*, (1915), p. 100.

⁶⁷ See article by Perrinjaquet, J., "La guerre européenne et le commerce des belligérants et des neutres" in *R. G. D. I. P.*, 22, (1915), p. 177.

⁶⁸ *Ibid.*, pp. 177-178.

sunk during the same period.⁶⁹ The causes of the destruction of the American vessels *Carib* and *Evelyn* during the first week of the new submarine warfare were doubtful.⁷⁰

The earlier cases of destruction of enemy merchantmen which induced the most vehement neutral protests were those of the *Falaba* and the *Lusitania*, the former sunk on March 28, 1915, the latter on May 7, 1915. As the present discussion is not concerned with the question of the safety of non-combatants at sea, these cases are of interest only for the facts as to the existence of necessity for sinking and as to the observation of the rule of law which requires visit and taking off of papers. The first question is concerned with destruction as such, the second with the submarine as an agency for destruction.

With regard to the first question, the circumstances of the present war appear to justify the conclusion that, viewed as a question apart from others involved with it, military necessity did exist in the cases above-mentioned and would be likely to exist in the majority of cases in which German warships of any type were concerned with merchantmen.

Without open home ports except those on the Baltic Sea, without open colonial ports, and with the omnipresent menace of recapture and its consequences, there is in fact no course open to a German warship except destruction or release of its prizes.

The second question is to be as readily resolved *against* the German Government. As the right of visit and search has its justification in the necessity, in the case of enemy vessels, of discovering the evidence as to the ownership of vessel and cargo which is contained in the ship's papers, so the right to destroy may be exercised only after this evidence has been secured. It may not be true, as is declared in the American note of May 13, 1915, that "it is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers

⁶⁹ Professor Garner states that "down to June 12, the number of Norwegian vessels that had been destroyed by mines and submarines was reported as twenty-nine, the aggregate value of which was estimated at \$7,500,000, the number of Swedish vessels twenty-four and the number of Danish vessels, fourteen", "International Law in the European War," VII, *A. J. I. L.*, 9, (July, 1915), pp. 610-611.

⁷⁰ Perrinjaquet, J., *R. G. D. I. P.*, 22, (1915), pp. 205-207.

and cargo",⁷¹ i. e., it may not be a physical impossibility, but it has been submitted and appears to be a well-grounded opinion that the same circumstances that render it suicidal for ordinary German war vessels to appear on the seas, viz., the superiority of the Allied fleets, makes the carrying out of visit and search by submarines inexpedient to the point of impracticability.⁷² The problem then resolves itself into the question of whether the submarine shall be regarded as entitled to disregard the regulations which the rules of warfare have established for warships as a class. The introduction of such factors as the use of neutral flags by enemy merchant vessels and their armament for defense is intended to cloud the real issue. The warship as such must cope with these recognized agencies for increasing the security of private property at sea. The submarine, since it carries on the operations of a warship, must submit to its limitations.

At present it is impossible to discuss adequately the position taken by the German Prize Court with reference to neutral property on board destroyed enemy vessels. It would appear from some of the early decisions that the court would follow the French precedent noted in the case of the destruction of the *Ludwig* and the *Vorwärts*.⁷³ The Court of Prize at Hamburg, refusing to compensate Norwegian owners of goods destroyed in connection with the sinking of a British vessel, said:

"Germany is in no way obliged to indemnify neutrals for losses experienced in such circumstances. The commander of a submarine has not time to inquire into the value of the neutral goods which may be sunk with the torpedoed ship. If he had time, how could he estimate whether the indemnities eventually to be granted for such goods would exceed the advantages to Germany of the destruction of a British vessel?"⁷⁴

The inference to be drawn from this decision is that the submarine commander should be relieved of any compunctions by the knowledge that his country will not have to pay compensa-

⁷¹ The Secretary of State to Gerard in *A. J. I. L., S. S.*, (1915), p. 131.

⁷² It has been suggested to the writer that it may not be the difficulties of visit and search alone which now limit German submarine activity, but the impossibility of acting profitably on the facts ascertained.

⁷³ See Chapter II, p. 37.

⁷⁴ Perrinjaquet in *R. G. D. I. P.*, 22, (1915), pp. 208-209, and n. 2, p. 208.

tion to neutrals, whose property may be destroyed on enemy ships. A preferable standard is that which assures the commanders of commerce destroyers that their services are of far more importance to their country than the value of the neutral goods destroyed and that their government will deduce from the rule of freedom for neutral property in enemy ships the corollary of obligatory compensation for the necessary destruction of such property.⁷⁵

At the same time that neutral governments were protesting against German treatment of the property of their citizens in enemy ships, they were concerned to an even greater degree in protests against similar treatment of the ships of their own citizens and of their cargoes. Not all of these cases arose in consequence of the German declaration of a "war zone". The German Government declared with reference to the destruction of the Dutch merchant ships, *Medea*, *Batavier* and *Zanstroon*, that they were engaged in carrying contraband of war.⁷⁶ Sir Samuel Evans, President of the British Prize Court, took occasion in his opinion in the Chicago Meat Packers' Cases to cite the decision of the Hamburg Prize Court in the case of the *Maria*. In this case the German court justified the destruction of a Dutch vessel carrying wheat to British merchants at Belfast on the ground that

"there [was] no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the bills of lading were made out *to order* which greatly facilitated the free disposal of the cargo".⁷⁷

⁷⁵ The British practice which applies this standard has never been accompanied with a denial of the obligation of visit and search. The latter requirement is not only consistent with the more lenient treatment of neutral owners, but would appear to be necessary in order to establish the identity of neutral non-contraband goods since duplicate papers would be unreliable.

⁷⁶ Torpedoed in the North Sea in the latter part of March, 1915. See Perrinjaquet, *R. G. D. I. P.*, 22, (1915), pp. 206-207.

⁷⁷ Cases in *A. J. I. L.*, 9, (October, 1915), p. 1004. This decision was to have been expected after the developments in the *Wilhelmina* case. It would appear, however, to destroy the German contention against the British treatment of foodstuffs as absolute contraband.

The most interesting and important case of this character was that of the United States merchant ship *William P. Frye*, which was sunk on January 28, 1915, by the *Prinz Eitel Friedrich*, while engaged in carrying a cargo of wheat from Seattle, Washington to Queenstown, Falmouth or Plymouth for orders. The United States made no claim for the cargo, but its claim for the value of the ship plus damages was immediately admitted to be valid by the German Government.⁷⁸

With the respective interpretations of the treaties of 1799 and 1828 between Prussia and the United States, which treaties Germany admitted to be in force, this study is not here concerned.⁷⁹ The points of interest here are (1) that Germany regarded the cargo of wheat as contraband; (2) that Germany held the destruction of a neutral vessel, the cargo of which was more than one-half contraband, to be justifiable when "the attempt to bring the American vessel into a German port would have greatly imperilled the German vessel in the given situation of the war."⁸⁰

Into this case the question of the submarine as an instrument of destruction did not enter. The question of the right of destruction involved two questions of fact: (a) the existence or non-existence of circumstances of military necessity; (b) the presence or absence of a sufficient contraband cargo to justify the capture and confiscation of the ship. As to the latter question there was no controversy, so that we may regard the contraband character of the wheat as having been established. The answer to the first question must equally be in the affirmative, since the situation of a German warship on the high seas in the present war has always been precarious in the highest degree. The note of October 12, 1915, in which the State Department accepts, conditionally, the German *modus agendi* according to which Germany "[reserves] to itself the right to destroy vessels carrying absolute contraband wherever such destruction is per-

⁷⁸ See correspondence between Secretary of State Bryan and Ambassador Gerard, in *A. J. I. L., S. S.*, (1915), pp. 180-182.

⁷⁹ See correspondence, *ibid.*, pp. 182-193.

⁸⁰ On July 10, 1915, the German Prize Court at Hamburg so decided, but it recognized that the Prussian-American treaties rendered the Imperial Government liable for indemnity. See note of Ambassador Gerard to Secretary of State, July 30, 1915, in *A. J. I. L., S. S.*, (1915), pp. 190-191.

missible according to the provisions of the Declaration of London," virtually concedes this:

"Without admitting that the Declaration of London is in force, and on the understanding that the requirement in Article 50 of the Declaration that 'before the vessel is destroyed all persons on board must be placed in safety' is not satisfied by merely giving them an opportunity to escape in life boats, the Government of the United States is willing, pending an arbitral reward in this [the Frye] case, to accept the Declaration of London as the rule governing the conduct of the German Government in relation to the treatment of American vessels carrying cargoes of absolute contraband".⁸¹

Other cases of the destruction of neutral merchant vessels of the United States will afford further basis for conclusions as to the effects of the European War upon the question with which we are now dealing. On May 1, 1915 the *Gulflight*, en route to Rouen from Port Arthur, Texas, was torpedoed. She afterwards managed to reach a British port. The submarine made no attempt to visit the ship before firing the torpedo. The German Government on June 1, 1915, explained the action as "an accident", due to the fact that the submarine commander had mistaken the *Gulflight* for an enemy vessel under convoy. "The German Government [expressed] its regrets . . . concerning this incident and [declared] itself ready to furnish full recompense for the damage thereby sustained by American citizens".⁸² On May 25, 1915 the *Nebraskan*, bound from Liverpool to the United States in ballast, was damaged by a submarine's torpedo. The German Government on July 12, 1915, again pleaded a mistake in identity and agreed to pay full compensation.⁸³

In neither of these cases was the neutral vessel destroyed, but in both the intent to destroy was admitted. In neither case was any attempt made to visit and search the vessel. The case of the *Nebraskan* appears an especially conclusive illustration of the length to which submarine warfare is liable to be carried. The ship was sailing west and the circumstances were favorable

⁸¹ Ed., *A. J. I. L.*, 10, (April, 1916), p. 371.

⁸² The German Minister for Foreign Affairs to Ambassador Gerard, in *A. J. I. L.*, *S. S.*, (1915), p. 137.

⁸³ *World Peace Foundation Series*, V, 5, pt. 2, p. 190.

to visit and search. Yet the commander preferred to take the chance that the vessel was hostile in character and to disregard the requirement of visit.

Admitting, then, the existence of circumstances which would have justified destruction had the neutral vessel been engaged in any service which would render her liable to capture and confiscation, the failure of the commanders of the submarines to determine whether or not that essential condition was fulfilled invalidates their action.

It seems clear that the practice of indiscriminate destruction of merchant ships has reached important dimensions because of the recognition of the same fact that has led Great Britain to develop her system for the control of trade, that fact being the vital importance of foreign commerce. Both systems in their operation would repudiate the right of enemy property to be respected in neutral ships and both systems do repudiate that right up to the point where neutral endurance ceases and the probability of effective neutral resentment becomes a certainty. The recognition of the vital interest of a nation in maintaining its commercial relations is as old as maritime warfare. The captains of the Confederate cruisers spared neutral merchantmen only through fear of the consequences if they acted otherwise. Today, with the merging of the commercial identity of the individual into that of the state in time of war, with the drawing together of the opposite corners of a country by new means of communication and transportation, and with the increased industrial and commercial activity of nations, the interest of a belligerent government in stifling the foreign commerce of its enemy renders of secondary importance the profit which it may derive from the capture of enemy property.⁸⁴ It is for this reason that the question of immunity is so complex. It must be considered not only separately but also in its relation to the comprehensive problem of control of trade. This

⁸⁴ This statement may be considered extravagant. In May, 1916, in a note addressed to a friend of the writer, Professor A. H. Charteris said: "It seems too early yet to say whether it pays to capture (and destroy); to capture and incorporate in one's own service is always an advantage". But the statement in the text refers to the success of a policy of destruction in seriously interfering with or annihilating an enemy's trade.

has been evidenced by the frequency with which new methods for interfering with the enemy's commerce have been adopted in order to replace older methods which either have been legally forbidden or have become obsolete in the presence of new conditions.

These new devices and methods, usually developments of older measures or outgrowths from their basic principles, point toward an increasing determination on the part of belligerents to regard commerce as an object of attack, not only legitimate but of the first consequence to the enemy. The tendency appears to be toward a view of an enemy nation's commerce as a whole, upon which an important portion of its war strength depends, and away from the older principle of separation into portions differing in ownership, character, and destination. The profit to be derived from considering as a separate question the abolition of capture in the narrow, accepted sense has become extremely doubtful.

It is in the light of this new concept of the importance of a nation's commerce that belligerent practice has been analyzed up to this point and that conclusions upon the questions which have been submitted as epitomizing the issues raised by the German "system" for the destruction of trade with the enemy may be ventured. Germany has had since the beginning of the war the justification for destruction which the existence of real military exigencies affords. This has been true as regards both enemy and neutral vessels. On the other hand, her usual practice has been in disregard of the requirement of visit and search before destruction; i. e., as regards the rule the application of which she could control, her practice has been inconsistent and has tended toward repudiation of the rule.

This accusation holds only as it applies to her submarine warfare. Her cruisers have followed the generally accepted regulations of maritime warfare. This distinction in fact may point to a distinction in principle. The handicap under which the submarine operates has many elements which need not now be recited. The most important of these elements, the impossibility of taking any appreciable number of passengers on board, lies outside the province of this essay. It is submitted, how-

ever, that, having regard only to those phases of the question which have been discussed, the submarine has not justified itself as a legal agency for the destruction of commerce, that it is even less suited to the business of capture, and that its use has weakened the case for destruction.

The "systems" for the control of trade which Great Britain and Germany have developed may be taken as the systems of the Allies and the Central Powers respectively. And it is probably true that the broad lines of these opposing "systems" had been laid down by July, 1915. It has seemed advisable not to carry the discussion of practice beyond that date. The present war has followed out the tendencies observed in previous wars, toward the creation of methods for the evasion of the prohibitions which had been established in international law for the partial protection of private property at sea. Great Britain and Germany both have extended the contraband list to a degree heretofore unknown. Great Britain is supplementing her blockade of German ports by a rigid supervision of the traffic of neutral ports. Germany has attempted to frighten commerce off the seas by showing herself ready to sacrifice legal safeguards recklessly. Great Britain has abused the right of visit and search by detaining ships and cargoes, thereby causing annoyance and loss to neutrals. Germany has failed to use the right where its use was demanded.

The rights of private property owners in the present war have been rendered entirely illusory. It has already been pointed out that the nature of the war is such as to make the control of the enemy's trade of high importance to a belligerent. That being true it inevitably followed that innocent private property would be placed under restrictions and deprived of the free movement that the laws of nations, formulated amidst other conditions, were intended to ensure.

The situation is not altogether discouraging. The belligerents have recognized that, in order to be permitted to violate the spirit of the rules which embody the progress so far attained, they must be ready to introduce such moderations of their practice as will substantially compensate neutrals. In some instances they have gone beyond what neutrals could law-

fully demand in regard to a particular measure, in order to ensure their acquiescence in other measures, the legality of which neutrals might impugn. Above all considerations of minor importance the belligerents have placed the idea of destroying the commerce of their enemies as an entity. In consequence the facility with which certain of the various means of interference with commerce may be extended and expanded to take the place of other means has been emphasized. The vast scale of maritime operations as they have been and are being carried on in the present war has provided the data necessary to a useful conclusion upon the trend of practice since the Declaration of Paris.

²⁶ BRITISH PRESUMPTIONS OF HOSTILE DISTINCTION

By the *Order in Council* of August 20, 1914 in *A. J. I. L., S. S.*, (1915), pp. 4-5, Great Britain placed in force Article 34 of the Declaration of London, according to which the destination of conditional contraband to the use of the armed forces or of a government department of the enemy state was to be presumed to exist "if the goods are consigned to enemy authorities, or to a contractor established in the enemy country, who as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy". The same presumption was to arise "if the goods are consigned to or for an agent of the enemy State, or to or for a merchant or other person under the control of the authorities of the enemy State". In the Order of October 29, 1914, the last mentioned presumption was curtailed by the loss of the final clause, while conditional contraband on board a vessel bound for a neutral port was to be presumed destined to the enemy forces or government if the goods were consigned "to order, or if the ship's papers [did] not show who was the consignee of the goods, or if they [showed] a consignee of the goods in territory belonging to or occupied by the enemy". This Order placed the burden of proof of innocent destination in the last-mentioned cases upon the owners of the goods. (*Order in Council*, No. 614 in *A. J. I. L., S. S.*, 1915, pp. 14-15.) Alongside these additions to the number of presumptions operating against the defendants was placed article 5 of the Order of August 20, 1914, by which the same rules were to apply to conditional as to absolute contraband proceeding toward a neutral port. The rigidity of this regulation was somewhat relaxed by the second article of the Order of October 29, 1914; thereafter only when it should be "shown to the satisfaction of one of His Majesty's principal Secretaries of State that the enemy Government [was] drawing supplies for its armed forces from or through such neutral countries",

would the 35th article of the Declaration of London be applicable. By this provision Great Britain hoped to secure and did secure the co-operation of neutral governments adjacent to the territories of her enemies for the prevention of transshipment to such territories and the preservation of their own commerce. Italy, the Netherlands, Denmark, Sweden, and Norway placed an embargo upon the exportation of many absolute and conditional contraband articles to enemy territory. In order to assure Great Britain of the *bona fide* character of these embargoes certain neutral countries permitted the organization of systems by which imports could be consigned to named persons or firms whose guarantee that the goods would not be re-exported would be accepted. The Netherlands Overseas Trust is, perhaps, the most prominent of these agencies. Such a plan, before the Order of March 11, though essential to unhindered commerce, was optional with the neutral countries adjacent to Germany. After that Order the increased liability of their carriers to capture acted as a more absolute sanction of the organization of commercial agencies which would mean assurance to Great Britain of the effectual operation of her system for control of trade.

CHAPTER VI

THE PRESENT STATUS OF THE QUESTION

The history of the development of the law of maritime capture is a record of progress. Throughout the series of overlapping changes from the time of indiscriminate capture, changes which brought successively into operation the rules of hostile infection, of the *Consolato del Mare*, of free ships, free goods, and finally of the Declaration of Paris of 1856, the movement has been continuously in the direction of relieving neutral property owners from the strictures imposed upon them by maritime war.

“Malgré les interruptions et les reculs temporaires dans toutes ces différentes réformes du droit de prise, on ne saurait méconnaître le fil rouge qui les parcourt toutes: c’est une tendance, avançant en dépit des obstacles et des efforts de résistance, à exempter la vie privée de l’influence de la guerre.”¹

Nevertheless the failure to comprehend or the reluctance to accept the plain conclusions to be drawn from history tends to obscure the elements which at any given time enter into the question of immunity for private property in war at sea. It is easy to regard the establishment of partial limitations upon the right of capture as evidence of a movement toward complete freedom of private property. This is especially encouraged by the existence of the principle of immunity in land warfare. The advocates of inviolability for the ships and cargoes of maritime entrepreneurs proceed from the argument that war at sea should be assimilated in this respect to war on land to the assertion that the developments which have been recorded constitute not only the beginnings of that assimilation but its practical realization in principle.

¹ Kleen, *Lois et usages*, II, p. 675.

Whether or not immunity for private enemy property rests upon any fundamental postulate of international law will be considered hereafter. It is submitted that whatever may be the status of the principle of immunity in warfare on land, in war at sea the rule of capture remains, subject to important limitations in the interest of neutrals and to relatively minor exceptions of certain forms of private enemy property. Neither of these classifications of restriction may be viewed as altering the question of principle. The latter is based upon special considerations of humanity or desire for the advancement of science and art and does not raise the principal question. The former has reached legal standing not through the influence of a theory of protection for private rights *per se* but through the continuous pressure of forces differently combined at different periods, among which theoretical dialectic is not to be overlooked, for the recognition of the rights of neutrals. At no period has there been a general acceptance among nations of the desirability of exempting enemy ships and enemy goods from the operation of the law of prize.

Immunity and neutral rights are entirely different questions when viewed from the standpoint of theory. The defence of inviolability for all private property at sea so far exceeds in difficulty that of exemption of neutral property as to preclude the drawing of any conclusions regarding the former from the establishment of the latter. But greater than the influence of theory has been the power of neutral governments to enforce observance of rights which they have at different periods considered to be rightfully theirs. The latest step taken by belligerents in acknowledgment of such rights is one which permits the transportation in neutral vessels, without fear of confiscation, of non-contraband cargoes owned by belligerents. The Dutch origin of this, the free ships, free goods principle; the record of its maintenance by the Armed Neutralities; and finally the voluntary incorporation of the principle by Great Britain in her rules for the conduct of maritime operations in the Crimean War, render it impossible to regard this final advance as anything but a concession to neutrals.

The establishment of complete inviolability as a principle of

maritime warfare remains, therefore, an ideal. The two avenues of approach to an adequate understanding of the present tendencies toward or away from a realization of the ideal in practice are (1) the appreciation of practice under the legal limitations on capture that now exist, and (2) the estimation of the present status of the movement for immunity.

Dealing first with the observance of the existing law of capture, attention is necessarily centered upon the second and third rules of the Declaration of Paris. The latter of the two rules, which provides for freedom from confiscation for neutral goods on enemy vessels, may be the more briefly considered.

In placing his goods on board an enemy ship a neutral must anticipate the possibility of the capture of the ship and consequent loss of time and profit. Lengthened contraband lists, a feature of modern practice which will be considered immediately affect such ventures as well as those upon neutral ships. The most serious though not peculiar liability which neutral cargoes undergo upon enemy vessels is one which follows upon the continuance of the ancient practice of destruction. While Great Britain maintains the rule of compensation for neutral property destroyed with enemy merchant vessels, the usual determination of other states has been in the contrary sense. Such decisions are based upon the law of military necessity and pay no heed to the logical alternative of compensation when neutral property, granted immunity from capture by the Declaration of Paris, has been destroyed. Bentwich, however, goes further than is justified by the facts regarding the destruction of enemy ships conveying neutral goods, when he foresees the general destruction of enemy vessels should they be rendered legally free from capture. It is more probable that if the ships themselves were not regarded as contraband the practice would follow that now put in operation against neutral ships—which may be destroyed only upon justifiable suspicion of certain illegalities.

The increased importance of submarine warfare has emphasized the tendency to act upon assumptions of military necessity. Simultaneously, the legal execution of a policy of destruction of captures has been proved to be a doubtful possibility, even if

the existence of military necessity be granted. The requirement of visit before destruction of an enemy vessel is one that holds especial difficulties for the submarine, even when the merchant ship is not armed. These difficulties have been increased by the varying practice of submarine commanders in the matter of visit, which has rendered the captains of merchant ships uncertain as to their probable fate and consequently willing to attack a submarine as a measure of defence.

The element of time required for visit and search is more important when the ship visited is neutral and the need arises to ascertain whether or not there is proof on board to justify her destruction. If it is necessary today to conduct a vessel into port for search, the circumstances that render capture impossible will operate with the same effect to render impossible the legal destruction of neutral vessels. If it is possible to search a ship at sea, the time required will increase the danger to the submarine from hostile cruisers.

What the development of the submarine may be cannot be foreseen. Whether it becomes more or becomes less vulnerable, more or less rapid in submerging, larger or smaller, the requirement of visit and search cannot be ignored as long as it remains a rule of international law. To ignore definite legal requirements because such requirements were incorporated into the law without anticipation of a particular means or instrument of warfare, or because they would prevent the most effective use of new equipment for war would be to divert international law from its present trend toward increased definiteness, and increased limitation upon belligerent action harmful to neutrals. The purpose of international law in taking account of new circumstances and new devices to evade old rules, if it is, in part, to maintain the advantages and disadvantages of opposing belligerents, is mainly to prevent retrogression from standards attained.

The attitude of belligerents toward the second rule of 1856, by which enemy property in neutral ships is made immune from capture has been partially dealt with in the preceding paragraph. Since the Russo-Japanese War, destruction at sea has become a menace to neutral as well as to enemy ships and their

cargoes. Other means of evasion of the rule—the actual observance or non-observance of which forms the crux of the question as to the value of the existing regulation of the right of capture—are plentiful. Realizing this, while granting that the letter of the law has been observed strictly, the conclusion that is forced upon the student of recent practice is that, through the unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral ships very nearly approaches nullity, and is only preserved in some semblance of vigor by the influence of neutral opposition to the devices of belligerents for rendering it a “dead letter”. Whether or not the ultimate realization of immunity waits upon the success in practice of the second rule of the Declaration of Paris may be an open question. Arguments have been quoted to the effect that that rule must be abrogated and either complete immunity substituted or the *Consolato* rule revived. It would seem, however, that unless the rule of safety for enemy goods in neutral ships be respected there is small hope for respect of a similar rule of safety for enemy ships and cargoes.

As has been suggested in an earlier chapter the device most readily available for evasion of the legal inviolability of neutral cargoes on board enemy merchantmen is the extension of the list of contraband. This device is particularly dangerous because the arguments upon which it rests are plausible and, to a considerable extent, well founded. It cannot be denied that scientific advance has resulted and is continuously resulting in the application of new articles to the manufacture of equipment and supplies for war. The temptation to emphasize the possible warlike use of a commodity of commerce has been irresistible. But of more far-reaching effect has become the practical revival of the medieval doctrine of the relations between the individual citizens and the governments of opposing belligerent countries. This has been brought about by the same development of scientific methods in the field of organization for and administration of the totality of the state's resources in time of war, a development which has enabled belligerent governments to destroy the

effectiveness of the double classification of contraband. That these phenomena are not mushroom growths of the latest war has been shown by examples of previous practice. The present war demonstrates the growing importance of this phase of the problem since the progress of the struggle has been marked by new additions to the contraband list and new regulations to render the proof of the innocence of a particular cargo more difficult. Of chief importance in the category of articles transferred from the list of conditional to that of absolute contraband are foodstuffs. The futility of exempting enemy property from capture and immediately or at convenience making the chief necessities of life absolute contraband is obvious. The present war has demonstrated in a striking way the inter-relationship of the questions of contraband and immunity for private property at sea. In view of the attitudes of the Powers toward the former question at the Second Hague Conference, an agreement to abolish contraband by the Third Conference may be regarded as among the possibilities.

The transfer, in the Russo-Japanese War, of numerous articles previously rated as conditional contraband to the list of absolute contraband should have been a warning to the delegates at the London Naval Conference that the compromise there formulated, which admitted the application of the doctrine of continuous voyage to absolute but forbade it with regard to conditional contraband, would be ineffective. In the present war, however, the continuous voyage principle has been applied to both categories of contraband, since from its beginning the attitude adopted toward national organization for war has been such as virtually to destroy the distinction between them.

Sustained by the authority of British Prize Court decisions, the opinions upon this point handed down by the United States Supreme Court at the time of the Civil War have an excellent prospect of becoming universally accepted in practice, provided, of course, that contraband is retained. The logic of the situation cannot be evaded and neutral protests have exhibited a realization of that fact.

The right of visit and search has been transformed in practice. There appears to be a considerable weight of authority

for the contention that the modern steamship cannot be thoroughly searched at sea. The protests of neutrals directed at detention upon suspicion are therefore likely to be without adequate basis if the suspicion has arisen after visit has been made. While the right of capture persists belligerents must be expected to make it effective if possible, and neutrals should anticipate an expansion of embarrassing restrictions to correspond with their enlarged facilities for evading capture or detection of guilt. They may demand, however, that the administration of admitted powers be accomplished *bona fide* and with the least possible delay. A probable line of advance lies toward an administrative arrangement by which the character and destination of cargoes may be vouched for officially. The analogy of such a practice with the acceptance of the certification of a public conveying vessel should assure its success as a principle and in practice.

The creation of new presumptions of the destination of conditional contraband to the armed forces of the enemy was foreshadowed in the Declaration of London. Even more onerous than the provisions of that instrument for transferring the burden of proof to the owner of the goods have been the regulations to that end proclaimed during the present war. Articles of conditional contraband have thus found obstacles hitherto unknown to their entrance into enemy territory.

Blockade, applied in accordance with the rules which have received universal acceptance, destroys all unlicensed communication with enemy ports within the scope of its operation, and has always constituted a recognized limitation upon neutral freedom of action. The war zone which was declared by Germany in February, 1915, has been called a submarine blockade with destruction as the penalty for attempted breach, but it has lacked the first essential of a blockade, effectiveness. The absence of that essential element was inevitable in circumstances where capture was impossible and the carrying out of visit and search impracticable. The so-called submarine blockade, like the war zones maintained by the use of mines, depends for effectiveness not upon capacity lawfully to prevent access to and

exit from ports in a blockaded area but upon the incitement of the fear of summary destruction in the owners and captains of merchant vessels. They are both "paper blockades", resort to which by belligerents is additional evidence of the importance attached to the ability to control the enemy's commerce.

The British or Allies' system, developed with the same motive of control, has likewise reached its climax in the application of blockade. The effectiveness of this blockade, except before the Baltic ports of Germany, is unquestioned. It has been lawfully carried out and has even been attended with a degree of moderation of the accepted rules of blockade, since the penalty of confiscation has not been imposed for attempted breach of blockade, and enemy property not contraband captured under a neutral flag has suffered no harder a fate than requisition.

But this unwonted moderation of a lawful blockade has been the sop offered to and so far accepted by neutrals for acquiescence in the supplementary "control" which the Allied navies have exercised over the commerce of neutral countries adjacent to or near enemy countries. By a supervision as rigid as that consequent upon the blockade of German ports, trading with the stipulated ports, in goods destined for or coming from enemy persons, has been prevented. Where it has been attempted and discovered the same consequences have followed as though the neutral port of destination were blockaded, except for the substitution of requisition for confiscation already noted. Goods which have succeeded in running the gauntlet of presumptions of hostile destination and have thereby proved their final destination to be neutral have been permitted to pass.

This situation brings into opposition the right of a belligerent to blockade an enemy's ports and the right of a neutral to transport non-contraband goods having their origin or ultimate destination in enemy territory, to or from ports not blockaded. Since not all commerce with the specified neutral ports is interdicted, the Allies' system is to be regarded simply as a comprehensive and thoroughly executed plan of capture carried out close to the ports of neutral countries situated near hostile territory. It leaves open the way for cargoes destined to be consumed by neutrals and it affords compensation, payable at the

end of the war, to the owners of innocent enemy or neutral property requisitioned from neutral ships.

If this, the crowning feature of the practice of the Allies, is considered apart from its relation to the blockade of German ports, it must be admitted that the second rule of the Declaration of Paris "[has followed] the Declaration of London into the sphere of ancient history and the neutral flag no longer 'covers' enemy property".² Though that rule must be read subject to the condition that a belligerent may requisition according to his needs, the present situation exhibits the intention of stopping all enemy trade. The general recognition of the Declaration of Paris makes the execution of that intention illegal.

If, however, the control exercised over the trade of certain neutral ports be regarded as supplementing the blockade, the same difficulty is experienced in meeting the logic of geography that was met with in discussing the application of the continuous voyage principle to contraband. In both cases the rule of intended destination has been substituted for that of avowed destination, and the substitution, either in view of the changed conditions of transportation or of the inherent logic of the development, has a considerable justification in fact and law.

It may be submitted that the points of attack for neutrals who wish to render effectual the rights of their merchants and shippers are the laws of contraband and blockade. So long as the former permit a belligerent to cut off an indefinite volume of trade with the ports of his enemy, and the latter permit the interdiction of all such trade, the rule of continuous voyage must be admitted to be the natural corollary of both. It is difficult to recognize the justice of the principles of contraband and blockade without recognizing that the principle of continuous voyage is also just. The Declaration of Paris has been disregarded, but the continuous voyage doctrine has been only the means used to prevent older belligerent rights from being reduced to absurdities and to maintain the advantages which maritime supremacy has hitherto been held to entail.

² Baty, T., "Naval Warfare: Law and License" in *A. J. I. L.*, 10, (January, 1916), p. 52.

Briefly to summarize the preceding conclusions: the letter of the laws of limitation upon capture has been followed but the laws have not been effective in practice. Contraband, blockade, continuous voyage, presumptions of hostile destination, visit and search, destruction, all of them admittedly established rights, have been extended arbitrarily so that it is impossible to contend that the Declaration of Paris has been observed. The degree of observance that it has been accorded has varied with the differing necessities of opposing belligerents. Continuously the sense of the importance of destroying the enemy's commerce has increased and alongside this development there has been revived the concept of control of all commerce which may result in assistance to the enemy, a concept which has lacked an adequate field of application since the great wars of the French Revolution and the Empire. In the present war the sanctions of destruction, and of capture with resultant sequestration or requisition, have formed the cardinal elements of the "systems" for control of trade placed in operation by the Central and the Allied Powers respectively. Both of these systems by virtue of their common objective contemplate, and, so far as they are effective, accomplish, the overthrow of rules of international law which have been developed after centuries of effort by combining the several means of trade restriction to which a belligerent may have recourse. It is not within the province of this study to discuss the changes which will be necessary in order that the laws which provide for the inviolability of the neutral flag may become effectual. That changes are necessary and that the movement for the immunity of all private property from capture at sea cannot be expected to raise the super-structure of legal limitation until the foundations shall have been strengthened are the inevitable conclusions to be drawn from the last half-century of practice.

Our conclusions upon the tendencies observable in the modern practice of the law of capture may be supplemented by other conclusions as to the present importance of the question of immunity, both as a general issue, debated by the theorists of all countries, and as a political problem, presenting different phases according as the circumstances of states vary.

The partisans of immunity regarded as a general principle have most frequently taken as the starting-point of their arguments the proposition that war is to be viewed as giving rise to a legal relationship of states which concerns individuals only indirectly; they point out that the existence of this relationship is already recognized in land warfare, and that logic demands the recognition that what is right and just in one must be applied in all other fields of warfare if conduct is to conform to the standard demanded by modern civilization. This thesis has always been disputed by the majority of English writers and is losing ground on the continent in consequence of the increasing tendency to admit that an actual conflict of interests exists between a belligerent state and individual citizens of an opposing state. In the words of Dupuis: "ce qui amène la soumission du vaincu, ce n'est pas le désastre militaire, ce sont les conséquences de ce désastre, c'est-à-dire les entraves que le vainqueur est en mesure d'imposer à l'activité du pays, désormais incapable de défendre la liberté de ses échanges, de ses transactions, de sa vie".³ The Rousseauian theory upon the basis of which immunity from the evils of war has been demanded and justified for non-participants in military operations has assuredly never gained public recognition as a legal principle and it appears to be losing rather than gaining the support of theorists.⁴

It is possible, however, to grant the soundness of the theory and still to demonstrate the futility of any attempts to apply it in principle to operations against commerce. Are the great mercantile corporations of the belligerent states, both those which purchase and produce and those which transport, to be looked upon as merely passive participants in a war in which their country is engaged? In importing the necessities of life, to which commerce in time of war reduces itself, are they not as

³ *Le droit de la guerre maritime*, p. 61.

⁴ Dupuis maintains the theory that capture rests upon a legal principle, as being the sanction of the interdiction of the use of the seas, "seule façon de remplacer sur la mer où la possession et la souveraineté sont impossibles, ce qui est, dans la guerre continentale, l'occupation du territoire". See *Le droit de la guerre maritime*, p. 64 and n. 1. Peillon contradicts this sentiment: "on ne parle plus du droit d'interdire la mer à ses ennemis. . . . Car la guerre, aujourd'hui, est un moyen de se faire rendre justice". *La propriété privée ennemie*, p. 55.

active participants as are those who work the guns? Do they not furnish the means of subsistence? Would not the efforts of actual fighting men be impossible if they could not be fed and clothed? And will not a country's fighting capacity be increased in proportion as it can use its men for actual military operations, leaving to transporters and importers the providing of the necessary supplies? How is it possible to regard the business of maritime commerce as aught else than the indirect but nevertheless active participation in war of the citizens of the belligerent states? Kleen would support his argument to the contrary by pointing out that the real nature of capture is piratical. "L'objet", he says, "n'en devient pas plus belliqueux parce qu'il augmente—ainsi que la fait toute chose quelconque possédée par la nation—le capital national et partant la capacité de la nation de supporter les fardeaux de la guerre."⁵ But it would be quite illogical and impossible to urge that private goods should not be interfered with simply because they do not come within the traditional and obvious category of contraband. Granted that goods are enemy property being carried in the ships of the enemy; that no neutral national can be injured by their capture (if such a situation can be imagined under present conditions); the opposing naval forces are concerned only with preventing necessities from reaching their destination. Upon them the individual of the enemy nation has no legal or moral claim, so long as he can be regarded as assisting their opponents.⁶

Nor has that enemy individual any prerogative, as Vidari seems to suppose, which would permit him to determine the amount of his property and effort, his *activité propre*, that he may expend for the common good. War demands the entire effort of a state and increases proportionately the liabilities of each citizen to maintain the public interest. Conversely it relieves the enemy state of the necessity of observing the rules of peaceful relationship since it is impossible to estimate to what extent the other state may demand the assistance of its citizens. Applying the principle of the "police power", which is simply

⁵ Kleen, II, p. 690.

⁶ Bluntschli, *Droit international codifié*, p. 35.

the power of government carried to its ultimate conclusion for the preservation of the life or safety of its citizens, the state may authorize the destruction of property without recompense. War creates a greater justification for the exercise of this right than does any imaginable situation of a time of peace. Westlake writes:

"On principle we must say that the capture at sea of enemy property as such is a military measure, an operation of war, and that its defence is therefore independent of the mediaeval doctrine of the solidarity of sovereigns and states with their subjects . . . Its justification must lie in its effect on the fortunes of a war".⁷

Wherefore the attempt to overthrow capture as a right must rest on the comparative ineffectiveness of that means of warfare rather than upon any supposedly legal relationship which should render private individuals immune from direct injury. But if it be granted that military measures must conform to legal principles and that war is a relation simply between states, the above brief analysis of the relation of the state to the individuals within it appears to demonstrate the futility of attempting to apply the doctrine of Rousseau to the problem of rendering war more humane.

Fortunately that problem does not depend for its solution upon theories of the juridical nature of war. Whether war is *bellum omnium contra omnes* or not it is by nature cruel and inhumane and for that reason entails *naturally* an effort to lessen its stringencies, an effort which may be expected to gain strength in proportion as it is recognized to be consistent with the interests of belligerents and of neutrals.

The moral or humanitarian argument for immunity may be pressed too far. Capture is only relatively, not absolutely, inhumane. The increased practice of destruction has, indeed, altered the aspect of capture and encouraged attempts of prospective prizes at escape, attempts which usually have ended in disaster to the merchant ships. Where the presumption is that the capture will be lawfully executed there is small likelihood that

⁷ *International Law*, II, p. 130.

the intended prize will try to escape, since the penalties for such an attempt are so severe.

The moral gain derived from the right of capture is to be balanced against the injury which it causes to private undertakings. The interest of neutral as well as hostile merchants and shipowners in urging the prevention or termination of wars has continuously increased as commerce has expanded and as maritime operations have been to a greater extent directed toward the annihilation of all enemy trade. And the prospect of the privations that are certain to result for all classes and, in a great war, in all countries, forms the basis of a restraining influence that should not be overlooked. It appears difficult to argue that capture is a useless weapon, in the face of the vehement protests, heard in the present war, against the stoppage of supplies. It is irrelevant to argue that to support capture on moral grounds is to demand that war be made as frightful as possible, since one may maintain the utility of a practice while refusing to countenance inhumane procedure in its operation.

The factor controlling the attitude of states will continue to be the effectiveness of capture, as a military method supplementing other means of naval warfare. The determination of this question is difficult because of the multitude and variety of its phases. The value of ships and cargoes condemned must be considered together with the injury caused by imposing an enforced idleness upon great numbers of merchant ships, and by preventing an enemy from bringing his prizes into port, thereby leaving to him the unprofitable alternatives of release or destruction. By causing a dearth of vessels suitable for transports the right of capture may operate to safeguard the captor against invasion. It may prove a means of defence by ridding the seas of ships intended to be used as auxiliary cruisers, by forestalling the transfer of sailors to warships, and by preventing the training of further reserves. The several historical instances of the failure of a belligerent to attain final victory after destroying the commerce of an adversary have been cited as proof that capture is not a decisive instrument of warfare. That argument fails to take account of the importance of capture to the victor. Capture, like other means of belligerent action, must be judged

as one part of a composite scheme, to be retained or discarded according as it is a necessary or unnecessary feature of the combination. And the importance of capture cannot be determined in a general formula, since it depends for each particular war upon the degree to which maritime operations are important.

Our study of the supplementary limitations which belligerents have placed upon commerce in time of war is sufficient proof that capture has lost a portion of its effectiveness in consequence of the development of means of communication and the increased rights of neutrals. Without the application of these supplementary measures capture would be useless as a means of shutting off the supplies of continental states but would retain its usefulness in driving hostile shipping from the seas, thereby increasing the cost of carriage and decreasing the facilities of the enemy for invasion by sea. Directed against an island power, capture without blockade is apt to be quite as effective as is capture combined with the blockade of a continental power, since in the former situation there is lacking the possibility of importation across land frontiers.

The military aspect of capture determines its political importance and the several factors of that aspect present different problems to states in different circumstances. These factors will be discussed separately as they affect the interests of different states, in order that the comparative significance of the problems which arise may be understood.

It may be prefaced that to neutral states the abolition of capture, *ceteris paribus*, is a matter of indifference. It is unlikely that, as Hautefeuille held in 1868, they would be injured thereby since the need of transports and auxiliaries of other sorts would leave the demand for ships as carriers of commerce as strong as or stronger than in time of peace. On the other hand the same obstacles that have been observed as rendering of no effect the rights of neutrals in war at sea would still exist. The change would consist simply in the assimilation of private enemy ships and cargoes to the present status of neutral property on the high seas.

The considerations that have moved states in determining their attitudes toward capture are in the main the following:

- (1) naval strength;
- (2) the extent of foreign trade carried under the national flag;
- (3) the sources of the national food supply;
- (4) the relation of capture to other agencies for control of trade;
- (5) the interests of neutrals.

(1) The arguments by which increases in naval expenditure have been obtained have always included that of the need of a navy sufficient to guarantee the continuance of foreign trade in time of war. Conversely the confidence inspired by a formidable fleet has at times either rendered states indifferent to immunity or led them to oppose new steps in that direction.

Great Britain today is the one Power in which such a feeling of confidence appears justified. To her the navy is the assurance of her continued existence. Her policy demands the capacity to dominate the seas against any probable combination of Powers. The realization of that result in war would bring as its natural corollary the power to control the enemy's trade while the securing of supremacy at sea by an adversary would mean the loss of the war. To Great Britain, therefore, the question of immunity appears chiefly a question subsidiary to the question of reduction of armaments. She will consider a decrease of her war equipment provided that other nations, to which other means of warfare such as armies of invasion are more important, will consent to moderate their military and naval programs.

The confidence of Great Britain in her naval supremacy must depend to some extent upon her consideration of probable allies and opponents. The history of her alliances of the last sixteen years shows that she now regards an "isolated" position as untenable. This consideration is of much greater importance to the maritime powers which may contemplate Great Britain as an opponent, so that any discussion of the individual attitudes of states must be submitted with the recognition that they are likely to be modified by the circumstances of an actual state of war.

On the other hand the alignment of friends and enemies in the present war is not to be regarded as a proper basis for general conclusions as to the advantages and disadvantages of capture for the separate states involved.

(2) If Great Britain is the only power which may count upon ultimate supremacy at sea in any probable war, other countries may regard capture, used as an offensive weapon for the destruction of British commerce, as of sufficient effectiveness to compel a considerable rise in freights and insurance and an appreciable transfer of British cargoes to the neutral flag. Germany, France, the United States, and Japan each possess the requisite naval strength to interrupt British commerce and cause appreciable loss before the seas could be cleared of their cruisers. The United States, with a small body of shipping to protect, might be able to maintain sufficient strength at sea to be a continuous menace to British commerce.

As navies and mercantile marines now stand, the balance of advantage would remain with Great Britain. This statement cannot at this time be substantiated if the destruction which German submarines have accomplished be regarded as a consequence of the existence of the right of capture. It seems not impossible that the submarine may drive Great Britain into the ranks of the exponents of immunity. However, considering only those means and methods of maritime warfare as are now admitted to be legitimate, the British Navy remains easily supreme. Excepting those of the United States, Great Britain is undoubtedly in a position to bottle up the ports of her possible opponents as she has in the present war, thereby rendering their fleets ineffective through forced inactivity or through destruction, and it is not inconceivable that in the end she could bring the same pressure to bear upon the United States. At the same time she can diffuse the isolated losses likely to result from new methods of attack directed against her widespread foreign trade and prevent the undue rise of insurance rates, as she has done in the present war, by a system of state insurance of ships and cargoes.⁸ And since Parliament has made it a criminal offence to treat contracts of insurance upon the ships and cargoes of

⁸ *The Times*, London, August 4, 1914, p. 2.

alien enemies as "debts of honor", British insurance companies will undergo losses due to the exercise of the right of capture upon the property of the enemy by British warships only when they have reinsured neutral companies which have taken risks on captured property.⁹

On the other hand the advantages which Great Britain's opponents might have drawn from the legal immunity of enemy goods under neutral flags have not been realized, but have been rendered illusory by methods which have been sufficiently discussed on previous pages. Thus, whereas the right of and limitations upon capture have been of no military value to the Central Powers, to Great Britain the right of capture has been the nucleus about which she has developed her system for the control of enemy trade, while evading the limitations upon that right.

(3) Alone among the great powers, with the possible exception of Japan, Great Britain depends for a sufficient food supply upon her ability to import by sea. To her, therefore, the right of capture presents, in this respect, a peculiar danger, a fact which she has used with good reason as an argument in justification of her claim that maritime supremacy should be hers of right. Because, however, of the protection afforded by her navy, the effects of the right of capture upon prices of food in Great Britain have hardly been important enough in the present war to affect the strategic situation. By keeping the seas open the Allies have been able to import foodstuffs almost at will, so that the continued high prices in France and the United Kingdom are to be credited largely to other factors than the liability of French and British vessels to capture.¹⁰ At the same time, so strict has been the Allies' blockade of German and Austro-Hungarian ports, and their supervision of trade to ad-

⁹ See for contrary views upon the question of the illegality of payments by British insurance companies to alien enemies a leading article in the *Manchester Guardian*, July 4, 1913, which deals with a statement of Sir Edward Beauchamp, chairman of Lloyd's, to the effect that "all such contracts will be faithfully carried out during war as in time of peace"; and an article by Bentwich, N., "Trading with the Enemy" in *A. J. I. L.* Vol. 9. 1915, pp. 352-372.

¹⁰ Ed., "Trade in War Time" in *The Political Quarterly*, No. 7, March, 1916, pp. 99-121.

jacent neutral ports, that Germany was compelled early in 1915 to place under government control the distribution of the supply of grain and flour.

It is fair to assume the possibility of conditions in which, being confronted by a combination of maritime powers of greater strength, Great Britain would find the harassing of her commerce in food supplies much more inconvenient, in fact extremely dangerous. War with a country possessed of a large fleet and ordinarily the source of a large part of British supplies of grain and meat would present such a situation. It is obvious, however, that only by a blockade of her ports could Great Britain be starved into submission. So that, while the possible shortage of foodstuffs is for Great Britain the most serious element in the question of capture, it is more to be feared as an influence tending to excite panic, than as one likely to become an actuality of sufficient importance to compel the discontinuance of military operations.

(4) The relation of the question of capture to contraband, blockade, and continuous voyage was dwelt upon at the Second Hague Conference. The recognition of the results of practice during the previous fifty years prevented the delegates of certain powers, to which immunity was desirable in principle, from voting in favor of a proposal which they knew would be ineffective in practice. Boeck foresaw the difficulty when he wrote:

*"il est inutile de faire entrer le principe de l'inviolabilité de la propriété privée ennemie à la mer dans le droit international positif, si les restrictions qu'apportent à ce principe la contrebande de guerre et le blocus doivent être démesurément aggravées par la théorie prospective de la continuité du voyage".*¹¹

The extended application of the concept of blockade, with its modern corollary, continuous voyage, presents special advantages to Great Britain as being the means whereby she can use her superior naval power to offset the advantages of overland importation which continental states enjoy. To Great Britain the right of capture would be reduced, if the application of the principles of blockade and continuous voyage were rendered im-

¹¹ Boeck, p. 695.

possible, to the less value which it has for France or Germany or the United States. On the other hand the abolition of contraband is favored in England, since that would assure to Great Britain supplies of food and munitions.

To continental states the abolishing of capture is a desideratum valuable in itself—since the presumption must be that the British navy will always be able to do a proportionately greater amount of injury through capture than will its opponents—but one more to be favored if blockade is simultaneously outlawed. To render shipping inviolable would be to perform a service of small value to Germany or France as long as a hostile blockade could be placed in operation not only before their own ports but virtually also before the ports of neighboring neutral countries.

The reluctance of Continental Powers to consent to the abolition of contraband is likely to diminish in view of the tendency to regard the destruction of prizes as the normal alternative to be adopted by a belligerent whose opponent has gained practical command of the sea. Under a régime of destruction the non-contraband character of neutral goods carried under the British flag is a matter of indifference to the captains of hostile commerce destroyers. Should any considerable bulk of British commerce come to be carried in foreign vessels, the possibility of profitable destruction would proportionately decrease, and with this the interest of Continental states in a contraband list that should contain foodstuffs and raw materials would again increase.

The contraposition of the major interest of Great Britain in the abolition of contraband and that of the Continental powers in the abolition of blockade appears to present the opportunity for a compromise which would render it possible to abolish capture with the reasonable expectation that such action would have practical effect. The outlook is the more encouraging in that the Second Hague Conference did not discuss the ways and means of meeting the difficulty which the continuance of contraband and blockade would place in the way of any attempts to render the abolition of capture effective.

(5) The history of the steps by which inviolability has been secured for certain classes of private property in war at sea

has always illustrated the conflict between belligerent and neutral interests. At no time since the Declaration of Paris, by which the neutral flag was permitted to cover any non-contraband cargo, have neutrals been able to render secure the validity of this safeguard. The sincerity with which they have upheld the law when neutrals has been belied by their actions when themselves at war. Even when, as neutrals, they have protested successfully against encroachments, they have not hesitated, when themselves belligerents, to extend the practice of the same or similar limitations upon neutrals.

The British argument at The Hague in 1907 presented the abolition of contraband as a measure that should be taken in the interest of neutrals. During the present war Great Britain has exhibited a willingness to preëempt rather than to confiscate conditional contraband; similarly she has requisitioned enemy goods and released neutral goods captured while destined to blockaded ports. If it must be admitted that the belligerent who extends the contraband list and enforces the principle of continuous voyages is acting within his rights as interpreted under the necessities of modern warfare, these moderations of penalty are demanded in the interest of neutrals and are to be regarded as the logical corollaries of the expansion of the belligerent field of action, and it should be within the province of neutrals to assure their permanence.

The publicists of all countries urge consideration for neutrals, dwelling upon the economic interdependence of states and pointing out that the danger of making enemies of neutral powers increases directly with the amount of interference with their trade. Great Britain has found it expedient to compensate neutral owners for the destruction of their innocent cargo with enemy merchant vessels, a standard of procedure which no other country has yet adopted. In the light of practice, however, the conclusion is inevitable that belligerents unfailingly have subordinated neutral rights to their own interests. The situation of the Declaration of Paris today demonstrates that, in previous wars as well as in the present, neutrals have been inclined to acquiesce in the progressive degradation of their lawful rights.

The investigation of practice and the evaluation of recent tendencies toward or away from immunity for private property from capture at sea lead to the same conclusion. The record of practice has exhibited during the last half-century the tendency to treat enemy commerce as a unit; the abolition of privateering which removed the grossest form of private booty-getting has been followed in several states by the abolition of prize money but also, among the maritime Powers, by the extension of traditional belligerent rights; the devising of supplementary means for rendering the older rights effective; and the consolidation of old and new limitations upon commerce into what have been termed "systems" for the control of all trade which may contain possibilities of assistance to the enemy. "Control" rather than "destruction" is the object of such a system in its complete development, enabling the separation of enemy from neutral commerce, the requisition of enemy and the release of innocent neutral property. The willingness to apply a policy of indiscriminate destruction must be regarded as having been evoked by the necessity that knows no law. Such a policy, however, displays the realization of the importance of attacking enemy commerce in its entirety, of disregarding the value of individual prizes, and of hesitating at no measure calculated to assist toward strangling the enemy by economic pressure.

Partisans of immunity continue to discuss the question as one concerned only with capture. The weight of their argument is now being directed, however, toward demonstrating the impracticability of the right of capture, rather than its inconsistency with theoretical justice. This continued attack upon capture *per se* is justified, perhaps, as an attempt to obtain half the loaf where the whole is beyond the possibilities of the moment. It fails to convince because it takes as its starting point the Declaration of Paris—which has been effectually abrogated in practice—and because it fails to appreciate sufficiently the attitude which nations possessed of considerable maritime power have come to adopt toward enemy commerce.

Governments, if their own relation to the development of this attitude has been sometimes unconscious, realize that the attitude exists and interpret the question of capture with that fact

in view. It is true that to all states capture presents its own aspects of benefit and injury. It has seemed to the writer that Great Britain would be justified, on considerations of selfish interest, in desiring the practice contemplated by the Declaration of Paris; and that, conversely, states to which war with Great Britain is not an impossible consideration are consulting their own interests in favoring the abolition of capture. The most efficient navy must in the nature of things accomplish the greatest injury to enemy commerce. Capture, if the Declaration of Paris were observed, would become a less decisive factor but one that would be most effective in the hands of the navy which could most nearly interdict the use of the sea to its enemy's fleets of war.

The situation that exists demands, however, that governments so shape their policies as to ensure that whatever advance in principle is accomplished shall be made effective. Accordingly we find that the proposition of immunity has received within the last decade a wider interpretation in parliamentary discussion and international conferences. Henceforth it can hardly be considered except in relation to the various elements—blockade, contraband, continuous voyage, visit and search, war zones—that are capable of being incorporated with the basic element, capture, into “systems” for the “control” of enemy trade, systems designed with the object of disorganizing utterly the economic life of an enemy state.

Reviewing the history of capture, estimating the value of existing legal limitations upon it, regarding the nature of foreign trade, recognizing the varying interests of states, estimating the effectiveness of maritime operations against commerce in the present war, one is inclined to ask whether the Declaration of Paris did not grant a degree of immunity greater than the spirit and conditions of the period justified. Assuredly certain of the means which have been taken to evade its rules have been defensible in reason to an extent that has baffled the efforts directed toward maintaining them in effectiveness. It is this consideration that deprives the situation of any discouraging aspect from the standpoint of international law. That one result of

the tendency toward an adaptation of the rules of warfare to changed conditions has been that the trend today appears to be away from the realization of immunity of private property from capture at sea is a consideration of minor importance if it means that belligerents have not been deprived, on purely technical grounds, of rights which they may fairly claim. Assuming that neutral interests also must receive consideration, and granting that they have not been adequately protected, it is inevitable that, while resort to war continues, accepted rules will have to be revised in the light of circumstances unforeseen at the time of their formulation. The principle of immunity is far from being realized in practice today, not because belligerents choose to disregard the rules of international law, but because under present conditions the destruction of an enemy's trade in its entirety appears to constitute an object of warfare of the first importance. So long as that attitude persists there will be necessary a work of reconstruction which will select and legalize those extensions of practice which are consistent with the progress of international law and will reject other extensions the operation of which is contrary to progress.

BIBLIOGRAPHY

BIBLIOGRAPHIES

- Bonfils, H. *Manuel de droit international public*. Fourth Edition by P. Fauchille. Paris. 1905. 710-711.
- Boeck, C. de. *De la propriété privée ennemie sous pavillon ennemi*. Paris. 1882. First 4 pages (unnumbered).
- Laveleye, E. de. *Du respect de la propriété privée en temps de guerre*. *R. D. I.* Vol. VII. 1875. 558-560.
- Posse, E. *Das Seebeuterecht*. *Zeitschrift für Internationales Recht*. Vol. 21. 1911. 173-176.
- Wehberg, H. *Capture in War on Land and Sea*. London. 1911. 193-201.

DOCUMENTARY SOURCES

- A. J. I. L.* Vol. 9. Special Supplement. July, 1915.
- Vol. 10. Supplement. April, 1916.
- American State Papers*. Foreign Relations. 6 Vols.
- British and Foreign State Papers*. Vol. 1, 20, 30.
- Conférence internationale de la paix, La*. The Hague. 1899.
- Congressional Record*. Fifty-eighth Congress. Second Session. Vol. 38. Part 6. 1904.
- Department of State. *Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Commerce*. May 27, 1915; October 21, 1915.
- Deuxième conférence internationale de la paix, La*. 3 Vols. The Hague. 1907.
- Dumont, Jean. *Corps universel diplomatique du droit des gens*. 8 Vols. Amsterdam. 1726-31. *Supplement*. Edited by Barbeyrac et Rousset. 5 Vols. Amsterdam. 1739.
- Foreign Relations of the United States*. 1898, 1899.
- Hansard*.
- | | | |
|---------------|-----------|------------|
| Third Series. | Vol. 146. | 1857. |
| " | " | 165. 1862. |
| " | " | 181. 1866. |
| " | " | 189. 1867. |
| " | " | 223. 1875. |
| " | " | 232. 1877. |

Fourth Series. Vol. 138. 1904.

" " " 183. 1908.

Fifth Series. " 3. 1909.

" " " 15. 1910.

" " " 27. 1911.

" " " 51. 1913.

" " " 62. 1914.

Malloy, W. M. *Treaties, Conventions, etc., between the United States of America and Other Powers.* 2 Vols. Washington. 1910.

Martens, G. F. de.

Recueil de traités. Second Edition. 8 Vols. Göttingen. 1817-1835.

Supplément au recueil. 10 Vols. Göttingen. 1817-1827.

Nouveau recueil de traités. 16 Vols. Göttingen. 1817-1842.

Nouveau supplément au recueil. 3 Vols. Göttingen. 1839-1842.

Nouveau recueil général de traités. 20 Vols. Göttingen. 1843-1875.

Nouveau recueil général. Deuxième série. 35 Vols. (21 Vols. Göttingen; 14 Vols. Leipzig) 1876-1908.

Nouveau recueil général. Troisième Série. 8 Vols. to date. Leipzig. 1908-1915.

Parliamentary Papers.

1905. Vols. 39, 103.

1908. Vol. 58.

R. G. D. I. P.

Vol. 11. 1904. Documents. 13.

Vol. 20. 1913. Documents. 35.

Vol. 22. 1915. Documents. 9-10.

Richardson, J. D. *A Compilation of the Messages and Papers of the Presidents.* 10 Vols. Washington. 1896-1899.

Rymer, T. *Foedera, etc.* Third Edition. 10 Vols. The Hague. 1739-1745.

Senate Journal. Fifty-fifth Congress. Third Session.

United States Statutes at Large. Fifty-fifth Congress. Vol. 30.

BOOKS

Ariga, N. *La guerre sino-japonaise.* Paris. 1896.

Barboux, H. *Jurisprudence du conseil des prises pendant la guerre de 1870-1871.* Paris. 1871.

Baty, T. *International Law in South Africa.* London. 1900.

Beer Portugael, J. C. C. den. *Oorlogs—en Neutraliteitsrecht.* The Hague. 1907.

Benton, E. J. *International Law and Diplomacy of the Spanish-American War.* Baltimore. 1908.

Bentwich, N. *War and Private Property.* London. 1907. *The Declaration of London.* London. 1911.

- Bluntschli, J. C. *Droit international codifié*. Translated from the second German edition by C. Lardy. Paris. 1874.
- Boeck, C. de. *De la propriété privée ennemie sous pavillon ennemi*. Paris. 1882.
- Boidin, P. *Les lois de la guerre et les deux conférences de la Haye*. Paris. 1908.
- Bon, L. *La guerre russo-japonaise et la neutralité*. Montpellier. 1909.
- Bonfils, H. *Manuel de droit international public*. Fourth Edition. Edited by Paul Fauchille. Paris. 1905.
- Bowles, T. G. *Sea Law and Sea Power*. London. 1913.
- Bynkershoek, C. von. *Quaestionum Juris Publici Libri Duo*. Leyden. 1737.
- Calvo, C. *Le droit international*. Fifth Edition. 6 Vols. Paris. 1896.
- Cobbett, Pitt. *Leading Cases on International Law*. 2 Vols. London. 1913.
- Cohen, A. *The Declaration of London*. London. 1911.
- Despagnet, F. *Cours de droit international public*. Fourth Edition. Edited by C. de Boeck. Paris. 1910.
- Dupuis, C. *Le droit de la guerre maritime d'après les doctrines anglaises*. Paris. 1899. *Le droit de la guerre maritime d'après les conférences*. Paris. 1911.
- Field, D. D. *Outlines of an International Code*. Second Edition. New York. 1876.
- Fiore, P. *Trattato di diritto internazionale pubblico*. 3 Vols. Turin. 1891. *Il diritto internazionale codificato*. Turin. 1909.
- Fish, C. R. *American Diplomacy*. New York. 1915.
- Funck-Brentano, T. & Sorel, A. *Précis du droit des gens*. Third Edition. Paris. 1900.
- Galiani, F. *De' doveri de' principi neutrali verso i principi guerregianti, e di questi verso i neutrali*. 1782.
- Gentilis, A. *Hispanicae Advocacionis*. Second Edition. Amsterdam. 1661.
- Gessner, L. *Le droit des neutres sur mer*. Second Edition. Berlin. 1876.
- Giordana, T. *La proprietà privata nelle guerre marittime*. Turin. 1907.
- Grotius, Hugo. *De jure belli et pacis*. Edited by W. Whewell. 3 Vols. Cambridge. 1853.
- Hall, W. E. *International Law*. Sixth Edition. Oxford. 1909.
- Halleck, H. W., *International Law*. Edited by G. S. Baker. 2 Vols. London. 1908.
- Hamman, W. *Der Streit um das Seebeuterecht*. Berlin. 1907.
- Hautefeuille, L. B. *Questions de droit maritime international*. Paris. 1868. *Histoire du droit maritime international*. Paris. 1869. *Droits et devoirs des nations neutres*. Third Edition. 3 Vols. Paris. 1868.

- Heffter, A. W. *Das europäische Völkerrecht*. Eighth Edition. Edited by F. A. Geffcken. Berlin. 1888.
- Hershey, A. S. *The International Law and Diplomacy of the Russo-Japanese War*. New York. 1906.
- Hirst, F. W. *Commerce and Property in Naval Warfare*. London. 1906.
- Holland, T. *Letters on War and Neutrality*. London. 1909.
- Holtzendorff, F. von. *Handbuch des Völkerrechts*. 4 Vols. Hamburg. 1889.
- Hübner. *De la saisie des bâtiments neutres*. The Hague. 1759.
- Hurst, C. J. and Bray, F. E. *Russian and Japanese Prize Cases*. 2 Vols. London. 1912 and 1913.
- Jones, L. A. A. *Commerce in War*. London. 1907.
- Kent, J. *Commentaries on American Law*. Eighth Edition. 4 Vols. New York. 1854.
- Kleen, R. *Lois et usages de la neutralité*. 2 Vols. Paris. 1898-1900.
- Klüber, J. L. *Droit des gens*. Edited by A. Ott. Paris. 1861.
- Latifi, A. *Effects of War on Property*. London. 1909.
- Lawrence, T. J. *The Principles of International Law*. Fifth Edition. London. 1913. *War and Neutrality in the Far East*. London. 1904.
- Leroy, G. *La guerre maritime*. Brussels and Paris. 1900.
- Loreburn, Earl. *Capture at Sea*. London. 1913.
- Lorimer, J. L. *The Institutes of the Law of Nations*. 2 Vols. Edinburgh and London. 1883-1884.
- Mably, L'Abbé de. *Collection complete des oeuvres*. 15 Vols. Paris. 1794-5.
- Macdonnell, Sir J. *Some Plain Reasons for Immunity from Capture of Private Property at Sea*. London. 1910.
- Mahan, A. T. *The Problem of Asia*. Boston. 1900. *The Influence of Sea Power upon History*. Seventh Edition. Boston. 1894.
- "Mancunian." *The Freedom of Commerce in War*. London. 1914.
- Manning, W. O. *Commentaries on the Law of Nations*. Edited by Sheldon Amos. London. 1875.
- Marsden, R. G. *Select Pleas in the Court of Admiralty*. Selden Society Publications. Vols. VI and XI.
- Martens, C. de. *Causes célèbres du droit des gens*. Second Edition. 5 Vols. Leipzig. 1859.
- Martens, G. F. de. *Précis du droit des gens*. Edited by S. Pinheiro-Ferreira. 2 Vols. Paris. 1831.
- Moore, J. B. *A Digest of International Law*. 8 Vols. Washington. 1906.
- Neumann, L. de. *Droit des gens moderne*. Translated from the third German edition by A. de Riedmatten. Paris. 1886.
- Niemeyer, T. *Urkundenbuch zum Seekriegsrecht*. 3 Vols. Berlin. 1913.
- Nys, E. *Le droit international*. 3 Vols. Brussels and Paris. 1904-1906.

- Olivart, Marqués de. *Tratado de derecho internacional público*. 4 Vols. Madrid. 1903-1904.
- Oppenheim, L. *International Law*. Second Edition. 2 Vols. London. 1912.
- Ortolan, T. *Règles internationales et diplomatie de la mer*. Third Edition. 2 Vols. Paris. 1856.
- Peillon, E. *La propriété privée ennemie*. Paris. 1910.
- Perels, F. *Das internationale öffentliche Seerecht der Gegenwart*. Berlin. 1903.
- Phillimore, R. *Commentaries upon International Law*. 3 Vols. Philadelphia. 1857.
- Piédelièvre, R. *Précis de droit international public*. 2 Vols. Paris. 1894-1895.
- Pistoye, A. de. & Duverdy, Ch. *Traité des prises maritimes*. 2 Vols. Paris. 1859.
- Pradier-Fodéré, P. *Vattel's Law of Nations*. 3 Vols. Paris. 1863. *Traité de droit international public*. 8 Vols. Paris. 1885-1906.
- Pufendorf, S. *Of the Law of Nature and Nations*. Oxford. 1710.
- Riquelme, A. *Elementos de derecho público*. Mataró. 1875.
- Rivier, A. *Principes du droit des gens*. 2 Vols. Paris. 1896.
- Rousseau, J. J. *The Social Contract*. Translated by H. J. Tozer. London. 1912.
- Satow, Sir E. *The Silesian Loan and Frederick the Great*. London. 1915.
- Schurman, J. G. *The Balkan Wars of 1912-1913*. Princeton. 1914.
- Scott, J. B. *The Hague Peace Conferences*. 2 Vols. Baltimore. 1909. *Cases on International Law*. St. Paul. 1906.
- Smith, F. E. and Sibly, N. W. *International Law as Interpreted during the Russo-Japanese War*. Boston. 1905.
- Stockton, C. H. *Outlines of International Law*. New York. 1914.
- Takahashi, S. *International Law applied to the Russo-Japanese War*. New York. 1908.
- Twiss, T. *The Law of Nations*. 2 Vols. Oxford. 1863. *The Black Book of the Admiralty*. Rolls series. 4 vols. London. 1871-76.
- Ullmann, E. von. *Völkerrecht*. Tübingen. 1908.
- Vattel, E. de. *The Law of Nations*. Edited by J. Chitty. Philadelphia. 1883.
- Verraes, F. *Les lois de la guerre et la neutralité*. 2 Vols. Brussels. 1906.
- Ward, R. *Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs*. Repub. London. 1875.
- Wehberg, H. *Capture in War on Land and Sea*. London. 1911.
- Westlake, J. *International Law*. 2 Vols. Cambridge. 1904-1907.

- Wheaton, H. *Histoire des progrès du droit des gens*. Fourth Edition. 2 Vols. Leipzig. 1865. *Elements of International Law*. Fourth English Edition. Edited by J. B. Atlay. London. 1904. *Ibid*. Fifth English Edition. Edited by C. Phillipson. London. 1916.
- Wildman, R. *Institutes of International Law*. 2 Vols. London. 1849.
- Woolsey, T. D. *International Law*. Sixth Edition. Edited by T. S. Woolsey. New York. 1892.
- Zouch, R. *Juris et Judicii Fecialis*. Edited by T. E. Holland. 2 Vols. Washington. 1911.

ARTICLES¹A. *J. I. L.* Editorials.

- "Seizure and Detention of Neutral Cargoes." Vol. 9. 1915. 456-451.
- "Mines, Submarines and War Zones." Vol. 9. 1915. 461-471.
- "The Controversy between the United States and Germany." Vol. 9. 1915. 666-680.
- "The Questions in Dispute between the United States and Great Britain." Vol. 9. 1915. 680-687.
- Annuaire de l'Institut*. Vols. 1, 2, 25, 26.
- "Award of the Arbitral Tribunal of the Permanent Court of Arbitration at the Hague in the Case of the French Mailsteamer *Carthage*" in *A. J. I. L.* Vol. 7. 1913. 623-629.
- Baldwin, S. E. "The 'Continuous Voyage' Doctrine during the Civil War and Now" in *A. J. I. L.* Vol. 9. 1915. 793-802.
- Baty, T. "Naval Warfare, Law and License" in *A. J. I. L.* Vol. 10. 42-52.
- Bentwich, N. "International Law as Applied by England in the War" in *A. J. I. L.* Vol. 9. 1915. 17-45.
- "Trading with the Enemy" in *A. J. I. L.* Vol. 9. 1915. 352-372.
- Bluntschli, J. C. "Du droit de butin" in *R. D. I.* Vol. 9. 1877. 508-557; Vol. 10. 1878. 60-82.
- "British Prize Court Decisions" in *A. J. I. L.* Vol. 9. 1915. 979-1005.
- Bulmerincq, A. "Le droit des prises maritimes" in *R. D. I.* Vol. 10. 1878. 185-268, 384-444, 595-655; Vol. 11. 1879. 152-215, 320-358.
- "National Laws and a Project for International Regulation of Maritime Prize" in *R. D. I.* Vol. 11. 1879. 561-650. Vol. 12. 1880. 187-205; Vol. 13. 1881. 447-515; Vol. 14. 1882. 114-190.

¹ The following abbreviations have been used throughout this study:

A. J. I. L., for *American Journal of International Law*;

R. D. I. for *Revue de Droit International et de Legislation Comparée*;

R. G. D. I. P. for *Revue Générale de Droit International Public*.

- Butler, C. H. "Immunity of Private Property at Sea from Capture during War" in *Report of the Eighteenth Conference of the International Law Association*. London. 1900. 66-81.
- "Freedom from Capture of Private Property at Sea" in *North American Review*. Vol. 168. 1899. 54-61.
- Campbell, R. G. "Neutral Rights and Duties in the Anglo-Boer War." (*Johns Hopkins University Studies*) Vol. 26. 9-149.
- "The Chile" in *A. J. I. L.* Vol. 9. 1915. 528-539.
- "Chronique des faits internationaux" in *R. G. D. I. P.* Vol. 1. 1894. 469-470; 804-827.
- Ibid.* in *R. G. D. I. P.* Vol. 21. 107, 246, 248, 259, 266, 268, 269.
- Ed. "The Declaration of Paris" in *Edinburgh Review*. Vol. 144. 1876. 183-192.
- Funck-Brentano, T. "La declaration du Congrès de Paris de 1856" in *R. G. D. I. P.* Vol. 1. 1894. 324-329.
- Garner, J. W. "Some Questions of International Law in the European War." (A series of articles in *A. J. I. L.*)
- Vol. 9. I-V. 72-113.
- Vol. 9. VI. 372-402.
- Vol. 9. VII. 594-627.
- Vol. 9. VIII. 818-858.
- Vol. 10. IX. 12-42.
- Vol. 10. X. 238-270.
- Gessner, L. "De la réforme du droit maritime de la guerre" in *R. D. I.* 1875. Vol. 7. 236-255.
- Hall, W. E. "On Certain Proposed Changes in International Law" in *Contemporary Review*. Vol. 26. 1875. 735-757.
- Hazell's Annual*. London. 1912-1916.
- International Law Association. *Report of the Rouen Conference*. London. 1901.
- Ibid.* *Report of the Berlin Conference*. London. 1907.
- Kleen, R. "Les decrets prohibitifs du Japon et de la Russie en matière de contrebande de guerre" in *R. G. D. I. P.* Vol. 11. 1904. 353-362.
- Laveleye, E. de. "Du respect de la propriété privée sur mer en temps de guerre" in *R. D. I.* Vol. 7. 1875. 559-602.
- Lawrence, T. J. "La question de la contrebande de guerre" in *R. D. I. P.* Vol. 12. 1905. 6-10.
- Maltzahn, C. von. "Das Wirtschaftsleben der Völker und der Seekrieg" in *Deutsche Rundschau*. Vol. 121. 1904. 100-119, 262-282.
- Manuel adopté par l'Institut. "Les lois de la guerre maritime dans les rapports entre belligérants" in *R. D. I. Deuxième Série*. Vol. 15. 1913. 677-704.
- "The Marie Glaeser" in *A. J. I. L.* Vol. 9. 1915. 528-539.
- "The Möwe" in *A. J. I. L.* Vol. 10. 1915. 547-553.

- Nys, E. "Une page de l'histoire de la mer" in *R. D. I. Deuxième Série*. Vol. II. 1900. 49-73.
- Perrinjaquet, J. "La guerre européenne et le commerce des belligérants et des neutres" in *R. G. D. I. P.* Vol. 22. 1915. 127-238.
- Pierantoni, A. "Les prises maritimes d'après l'école et la législation italienne" in *R. D. I.* Vol. 7. 1875. 619-656.
- Posse, H. E. "Das Seebuterecht" in *Zeitschrift für Internationales Recht*. Vol. 21. 1911. 123-378.
- "The Porto, The Barmbek et al." in *R. G. D. I. P.* Vol. 22. 1915. Jurisprudence. 1-12.
- R., A. "Institut de droit international—Session de 1882" in *R. D. I.* Vol. 14. 1882. 583-612.
- "Session de Munich" in *R. D. I.* Vol. 15, 1883. 597-619.
- Rolin, A. "La XXVIIIe session de l'institut de droit international" in *R. D. I. Deuxième Série*. Vol. 14. 1912. 539-551.
- R., E. "Institut de droit international—Session de 1887" in *R. D. I.* Vol. 19. 1887. 329-366.
- Rolin-Jaequemyns, G. "Review of 'La course maritime' by E. Caron" in *R. D. I.* Vol. 7. 1875. 697-698.
- "Chronique du droit international" in *R. D. I.* Vol. 10. 1878. 5-59.
- Roszkowski, G. de. "L'union interparlementaire" in *R. D. I. Deuxième Série*. Vol. 16. 1914. 157-182.
- Scott, J. B. "The Status of Enemy Merchant Ships" in *A. J. I. L.* Vol. 2. 1908. 259-270.
- Statesman's Year Book*. London. 1914, 1915.
- Stockton, C. H. "Immunity from Capture" in *A. J. I. L.* Vol. 1. 1907. 930-943.
- Ed. "Trade in War Time" in *The Political Quarterly*. No. 7. March. 1916. 99-121.
- "Tribunale delle prede di Smirne" in *Rivista di diritto internazionale*. Série II. Vol. 1. 146, 552, 559-562.
- Times*, London.
- Weekly Edition. August 26, 1904; March 17, 1905.
- Regular Edition. October 9 and November 1, 1912; November 6 and 12, 1913; May 8, August 6, 8, 11, 14, 1914; April 9, 1915.
- Vallatton, M. J. "De quelques conflits de coutumes de la guerre maritime" in *R. D. I.* Vol. 16, 1914. 287-304.
- Vidari, E. "Navires ennemis et marchandises ennemis" in *R. D. I.* Vol. 3. 1871. 268-287.
- Wilson, H. W. "The Protection of our Commerce in War" in *Nineteenth Century*. Vol. 39. 1896. 218-235.
- Woolsey, L. H. "Early Cases on the Doctrine of Continuous Voyages" in *A. J. I. L.* Vol. 4. 1910. 823-847.

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FAIR VALUE—ECONOMIC AND LEGAL PRINCIPLES

CHAPTER I

THE THEORY OF FAIR VALUE

THE PROBLEM OF FAIR VALUE: A SYNTHESIS OF THE SOCIAL AND PRIVATE POINTS OF VIEW WITH RESPECT TO WEALTH

Those things and services which have utility and which are scarce, and only those, are classed as wealth. By utility is meant the power to satisfy a human want. By scarcity is meant insufficiency to satisfy wants. Wealth, therefore, includes those things and services which are wanted by human beings and which exist in quantities less than sufficient to satisfy all want for them.

The objects of wants are called goods. In the concept of goods, there is no implication of benefit, legality or moral quality. Whiskey, a burglar's jimmy, and the assassin's bomb, are goods as well as clothes and bread, for they all satisfy wants.

With respect to wealth, there are two points of view, namely, the social and the private. The former is the point of view of a sovereign group of people; the latter is the point of view of a member of the group.

The social and private points of view with respect to wealth are antithetical. On the one hand, it concerns society to increase the stock of goods which promote social well-being, to abolish the production of goods which are detrimental to its welfare, and to secure a fair distribution of wealth among its members. On the other hand, the individual desires to increase the relative

amount of wealth under his control. The individual does not think in terms of the social effects of goods, nor in terms of fair distribution; he thinks in terms of acquisition. The opium trade, the saloon, the sale of wild-cat securities, the existence of monopoly surpluses, and the prevalence of demarcation disputes between trade unions, are abundant evidence of this fact. It is true that, in order to acquire wealth, the individual may subserve social interest by creating beneficial goods, but the result and the purpose must be sharply differentiated. Acquisition is the goal of individual activity; the production of socially beneficial goods and fair distribution are the goals of social activity. With respect to wealth, therefore, a conflict of interest exists between the individual and society.

The bases of this conflict of interest between the individual and society are the scarcity of goods and the dominance of self-interest as an economic motive. It is obvious that there could be no antagonism of interest if all goods were plentiful. But most goods are scarce, which means that not all people can have what they want of them. Even this would not cause a conflict of interest if altruism were to supplant self-interest as an economic motive, for then no individual would be content not to contribute to the welfare of other individuals and to the welfare of the group. But since most goods are not plentiful, and since self-interest is the principal economic motive, the conflict of interest between the individual and society prevails.

This antagonism of interest is fundamental. Goods will always be scarce for two reasons: first, because it requires effort to produce them, and second, because of the expansibility of human wants. Whether or not altruism will ever replace self-interest as an economic motive is a matter of speculation. Certain it is, however, that such a transformation in human nature will not take place rapidly.

Any theory, therefore, which is worth while in the solution of economic problems must posit the fundamental nature of this conflict of interest. We may wish that goods were plentiful. We may regret the fact that altruism is not the sole economic motive. But wishes and regrets will not change the facts. Consequently, if we desire to develop a workable theory, we

must assume that goods are scarce and that self-interest is the primary economic motive.

In the theory of fair value, we seek to synthesize the social and private points of view with respect to wealth. The principle of diminishing sensation, or reaction to external stimuli, furnished the basis for a synthesis of the antithesis between value and utility. In like manner, institutional principles furnish the bases for a synthesis of the private and social points of view with respect to wealth. That the unifying principles are found in institutional laws is a result of the nature of value and of the laws governing its determination.

THE NATURE OF VALUE AND THE LAWS GOVERNING ITS DETERMINATION

Value is power in exchange. For instance, one bushel of wheat may command in exchange two bushels of oats, or ten bushels of wheat may command the services of a lawyer or doctor. These things have value. An ordinary pebble, however, commands nothing in exchange. It has no value. As a result of this, wheat and oats will be raised, men will devote time and effort to acquiring a knowledge of law or medicine, but nobody will gather pebbles. Value, therefore, connotes control over human conduct. It is the power to direct human enterprise and to shape human choices.

But the value a thing has may not be identical with the value it should have. To explain the former is to establish a theory of value; to explain the latter is to establish a theory of fair value. We cannot, however, develop a theory of fair value without a clear understanding of the principles that govern the determination of value.

The fundamental factors in the determination of value may be grouped under three heads: (1) human nature, (2) natural conditions and laws, and (3) social institutions. These are the factors that are immediately operative in the fixation of value. In the long run, education, in so far as it changes human nature, is effective in value determination. Also, government authority, in as much as it may change social institutions, such

as property, inheritance, contract, etc., is a determinant. This preliminary statement needs some elaboration.

The well-known supply and demand analysis offers the most satisfactory means of explaining value. Differences in personal wealth and the law of diminishing utility enable us to construct potential demand curves for all items of wealth. A potential demand curve indicates the relation between the value of a unit of a good and the number of units of the good that would exchange at that value. In other words, it indicates the power in exchange of a unit of a given amount of a good.

For the same person, this power in exchange of a unit of a good varies with any change in the status of that person's wants. It varies with fashion, whim, travel, education, and new experiences of all sorts, for these experiences change the relative importance of wants and, therefore, of goods. It also varies with differences in individual income, for the status of want and satisfaction depends not on the total amount of wealth in society, but upon the manner of its distribution among the members of the group. Nobody estimates bread, for instance, according to the amount of it in existence, but according to the amount of it he has, which, obviously, depends on his general means. Personal distribution is, therefore, of equal importance with psychical principles in the determination of potential demands. For different persons, power in exchange varies with taste, habits, saving instincts, human relationships, and many other things.

Moreover, the values of goods are so closely related that a change in the value of one is likely to affect the value of all others, for every person tends to keep his wants in a state of equilibrium with respect to all goods. A fall in the value of one good is not, therefore, accompanied by a corresponding increase in the demand for that good, but by a general increase in the demand for all other goods.

But none the less, at any particular time, a potential demand curve for any good indicates the precise condition of want with respect to that good, or the power in exchange of a unit of a given amount of the good. At any time, the value of a unit of a good varies inversely with the amount of it. If the

amount of the good increases, value falls; if the amount decreases, value rises.

This leads us to discuss supply. Differences in natural laws and conditions result in very different conditions of supply. In some cases, physical relations are such as to result in supply under conditions of natural monopoly. Despite the efforts of man to prevent it, natural monopoly exists, and for the simple reason that natural laws are more potent than legislative enactments. Professor Ely has stated, cogently enough, the law of natural monopoly.¹

"Whenever there is a decided increment in gain resulting from combination, we have a tendency to monopoly which will overcome all obstacles. This increment of gain, which is the cause of monopoly, is always present in businesses that occupy peculiarly favorable spots or lines of land, and that furnish services or commodities which must be used in connection with the plant."

In other cases, no increment of gain results from exclusive control, and competitive conditions prevail. This is the case with businesses in which the point of maximum efficiency is reached in relatively small units. Such businesses are naturally competitive.

One difference between naturally competitive businesses and naturally monopolistic businesses lies in the extent to which the law of increasing returns, or decreasing costs, is operative. Since there are all degrees of effective play of this law, between businesses which are naturally competitive and businesses which are naturally monopolistic lie some businesses which are in neither category. There is always a tendency to monopoly through agreement in this field, but the fluidity of capital funds undermines the stability of such control.

Under competitive conditions, the supply of any good is adjusted to the demand for that good in such a manner as to establish a value which normally just covers marginal expenses of production. Expenses of production include wages, interest and necessary profits. True enough, in the case of competitive businesses subject to the law of decreasing costs, there accrues

¹ Ely, R. T., *Outlines of Economics*, 1915 ed., p. 196.

a temporary differential return to the supra-marginal business unit; and to businesses subject to the law of increasing costs, there accrues a permanent differential return to the supra-marginal business unit. The former is true of all competitive mercantile and manufacturing plants, and is due to superior business ability, or to ignorance and inertia; the latter is true of agricultural and urban lands, and is due to the peculiar limitation of the supply of these economic agents. But, whatever may be true above the margin, it is quite true that value must normally cover expenses of production on the margin. If it does not, the supply will not be forthcoming; if it does more than this, the supply will be increased, and the value will fall. Under competition, then, value tends to equal marginal expenses of production.

Under conditions of natural monopoly, value tends to the point of highest net return. It, therefore, bears no relation to expenses of production other than the use of that element in determining the point of maximum profits. This is true because the monopolist controls the supply and may adjust it to the demand to suit his personal interest. If the demand for a monopolized good were highly elastic, value would just cover expenses of production. However, most goods produced under conditions of natural monopoly are, to a greater or less extent, necessities, the demand for which is inelastic. That is to say, about as much will be wanted when the value is high as when the value is low. Monopoly value, therefore, tends to be considerably above expense of production.

In the fields of business which are neither naturally competitive nor naturally monopolistic, value is liable to wide fluctuations, although this is not a necessary result. If monopoly is established through agreement, two policies are open: first, value may be fixed so as to just cover expenses of production, or second, the monopoly principle of value may be applied. In the latter case, profits will be large for a time, but competition will be induced, which will result in a productive capacity in excess of probable demand. The inevitable result is destructive competition with value, for a while, below expenses of production.

So far in the analysis of value, we have assumed the existence of institutions, such as property, inheritance, contract and personal liberty. These institutions are fundamental in the determination of value. In general, it may be said that competition and monopoly can operate only under the conditions imposed upon them by the fundamental socio-economic institutions. In so far as society puts limitations on the right of private property, the right of inheritance, and the right of contract and personal rights, it changes the effective operation of competition and monopoly, and thus alters value. A more specific statement of the relation between institutions and value is requisite.

In the first place: the role of personal distribution in the determination of value has been alluded to; personal distribution is of equal importance with psychical principles in shaping potential demand curves. The income of any individual depends on his relative efficiency as a laborer or entrepreneur and on the amount of income-bearing property that he owns. This property may have been acquired through the individual's efforts in competitive fields, through the ownership of land, through the special advantages incident to monopoly position, through inheritance, through gambling, or in any other way. If we accept Cairnes' theory of non-competing groups, we must also recognize the influence of institutions in keeping the majority of people in the class in which they happen to be born, and thus in preventing the full play of personal ability. But, whatever may be the relative strength of the two factors, it is evident that personal income is a function of two variables, namely, personal ability and institutions. Whatever society may be able to do through eugenics to improve personal efficiency, or through education to give free play to personal ability, it is certain that social control of the institutions under which wealth is acquired may alter personal distribution and thus influence value.

In the second place: the use or misuse of institutions may result in monopoly or in fostering monopoly. Such monopolies may be called institutional monopolies in contradistinction with natural monopolies. Professor Ely classifies them as social

monopolies² and includes in the classification (1) general welfare monopolies, or those arising from patents, copyrights, trade-marks, fiscal needs and sumptuary legislation, and (2) special privilege monopolies, or those arising from public favoritism, such as tariff legislation, and those arising from private favoritism, such as rebates.

To these may be added those partial monopolies which arise from practices which restrict competition. Among these practices are the use of factors' agreements, the use of exclusive contracts, the use of collateral patent agreements, etc. But whatever may be the particular cause of one of these institutional monopolies, it is evident that they are effective in value determination. It is equally evident that society may control institutions so as to make or unmake them. For instance, contract may be defined so as to exclude all unreasonable agreements in restraint of competition, or personal liberty may be defined so as to deny an individual the right to accept a rebate. Thus society may control value.

The method of social control of value so far outlined consists in direct institutional definition. That is to say, it consists in the direct determination of the conditions under which value is determined. There is another method available. Society may directly fix value or price.

It is clear that the first method is preferable in the case of competitive businesses; the second, in the case of natural monopolies. Either of the two may be used in the case of institutional monopolies, depending on whether the monopoly ought to be destroyed or maintained.

The laws governing the determination of value preclude other methods of control. Value is a complex result of a number of widely different causes. In so far as it depends on natural conditions and laws, society can have no control over it. The state cannot control psychical principles, although it may change the individual's attitude toward the acquisition and use of wealth in such a manner as to affect value. This is the function of education. But the institutional factors in the determination of value can be controlled, and it is in this direction, then, that

² Ely, R. T., *Outlines of Economics*, 1915 ed., p. 194.

we must seek the principles which synthesize the social and private points of view with respect to wealth.

We would not minimize the function of education. By means of it, the state, undoubtedly, can do a great deal to engender proper notions of the use of wealth. In so far as this is possible, it simplifies the problem of institutional control. The problem remains, however, as long as self-interest is the dominant economic motive. Immediately, then, institutional definition is the feasible means by which society can control the economic conduct of its members so as to secure social welfare.

THE DEFINITION OF FAIR VALUE

The relation between personal distribution and value furnishes the basis for a definition of fair value. Value is the power that a good has in exchange. Fair value is the power that a good ought to have in exchange. The power in exchange that a good ought to have depends on the social consequences of that power. If the result is to direct human enterprise and to influence human choices so as to promote social well-being, value is fair. Since society is composed of individuals, this result depends on the manner in which wealth is distributed among the members of the group. If, therefore, wealth is distributed among the members of society so as to secure social well-being, value is fair.

Consequently, the problem of fair value may be summed up in the question, What sort of personal distribution will promote group welfare? The answer to this question depends on the nature of society and of social purpose.

THE NATURE OF SOCIETY AND OF SOCIAL PURPOSE

In the main, the Classical School experienced no difficulty in synthesizing the social and private points of view with respect to wealth. That School held an implied social contract theory of society, and identified social wealth with the sum total of individual wealth. The social organism theorists, whether of the crude biological or the more refined psychological type, dodge the whole question, for they either submerge the individual or consider him a toy in the hands of social processes.

We conceive society to be a "summation of those parts of individual consciousnesses which are alike."³ Instinct, imitation and conscious cooperation are elements in determining like consciousnesses. The first two elements arise from psychology and environment; the last one, from rational awareness of common interest. Differences in individuals are recognized, whether innate or acquired differences in efficiency, or acquired differences in wealth. Under this theory, necessary differences may be adjusted in the interest of the group. Consequently, social and private interests are capable of being synthesized. We may, then, develop a conscious social policy which is made effective through organized social machinery or government.

What of social purpose? Is economic welfare measured in terms of consumption, production, distribution? Or is it measured in terms of social strength? Obviously, production, as such, cannot be the criterion of economic welfare, for production will be controlled by the purpose for which it is carried on. Likewise, distribution, *per se*, cannot be the criterion of economic well-being, for there must be some criterion of distribution. Is the object of economic endeavor, then, to secure maximum enjoyment from wealth, or is it to use wealth so as to increase the power of a group to survive? In other words, is the primary purpose of a state to enjoy itself or to live?

It is unquestionably true that modern economic thought assumes the latter. We hear less now than formerly of the economy of happiness, of pleasure as the end and aim of economic endeavor. A social philosophy of pleasure, or consumption, is, at best, enervating in its effect; a philosophy of social strength is far more wholesome. The former leads with certainty to individual and national decay and must, therefore, be discarded. To live, to grow strong, is the primary purpose of a state. Consequently, it must encourage those forms of economic activity which give it strength, and it must destroy those forms of economic endeavor which weaken it.

³ Haney, L. H., *The Social Point of View in Economics* in *Quarterly Journal of Economics*, Nov. 1913, p. 115.

THE WAY OF SOCIAL STRENGTH

The way of national strength is conservation of human and natural resources. There is nothing more certain than the fact that society weakens itself when it permits human power to go to waste either in idleness or in the mere acquisition of wealth. It is equally certain that the way to stop this waste of human power is to lay down the law of personal productivity distribution: only those persons who produce wealth may have it, and they may have it in precisely the proportion in which they produce it. If this is the only way in which individuals can acquire wealth, they will acquire it in this way, and thus will society secure the maximum economy of its human resources. In other words, self-interest, in striving to satisfy its own desires, will necessarily promote the well-being of the group.

Capital is a means of conserving human power by increasing the productivity of man's efforts to utilize natural resources. Under the law of personal productivity distribution, the amount of capital that an individual could accumulate would depend on his productive efficiency and on his productive saving. Thus capital would come into the hands of those individuals most capable of using it, and thus would society secure the maximum economy both of its human productive power and of its natural resources.

But property in natural resources must be defined so as to prevent waste. Wasteful exploitation is not social production. It merely results in enriching the individual at the expense of the group, and this is precisely what society must eliminate. Society must see to it that the individual prospers economically in exactly the proportion in which he makes additions to national strength.

Likewise, society must define production so as to suppress the manufacture and sale of those goods which lower the mental and physical efficiency of its members. For instance, from the private point of view, making liquors for beverage purposes is production, for liquors have utility and they are scarce. The results of using them, however, are vicious. Human power is not conserved. Consequently, from the social point of view, brewing and distilling liquors are not productive enterprises.

There can be no doubt of the fact that production ought to be defined in terms of social strength, and not in terms of consumers' satisfaction or individual interest. The farmer who permits weeds to grow on his farm does not prosper, nor does he improve his possession if he skims the soil. In like manner, society cannot grow strong if it permits the existence of harmful commodities or the wasteful exploitation of its natural resources.

This position is not always accepted. The term personal liberty is an implicit protest against it, for personal liberty assumes that the purpose of society is to enjoy itself, and that an individual may do what he pleases with that which he owns. Personal discipline, therefore, is the more satisfactory term in social economics, for it connotes that the purpose of a state is to live, to grow strong, and it recognizes the necessity of defining production in terms of group well-being.

There are two methods, then, of conserving human power and natural resources, namely, by establishing the law of personal productivity distribution and by defining production so as to exclude wasteful exploitation and the making of harmful commodities. Both of these methods may be made effective through institutional definition. Henceforth, we may assume production defined as indicated. This leaves the question: Under what conditions would personal distribution be in proportion to personal efficiency?

PERSONAL PRODUCTIVITY DISTRIBUTION

Under conditions of equal opportunity to produce, the most efficient producers would control industry. This class of enterprisers would control business for the reason that its members would be able to make the most effective appeal to the self-interest of buyers. Moreover, in proportion to the effectiveness of the appeal to buyers would producers profit economically. That is to say, distribution would be proportionately related to personal productivity. Consequently, the state may establish the law of personal efficiency distribution by doing away with all those things which stand in the way of equality of opportunity.

In order to do this it is necessary to make many institutional changes. To what extent this ought to be done depends on the effect of the necessary changes on productive effort. In so far as there is an appeal to productive endeavor inherent in such institutions as property, contract, inheritance, etc., they promote social welfare, and should not be molested. We may leave this problem until we come to discuss property in land and inheritance.⁴

The position we have taken does not imply the annihilation of humanitarian or utilitarian considerations. The elimination of the economically weak is an economic necessity. The treatment of the present unfit is a matter of social concern undoubtedly, but not one that should be perpetuated by making need or sacrifice the basis of distribution. To make itself strong, a state must encourage its most useful members by rewarding them according to the degree to which they promote economic well-being. To do otherwise is to encourage weakness and does not promote the ultimate welfare of the individual. Any system which promotes the ultimate well-being of men cannot be called inhumane.⁵

FAIR VALUE AND EXISTING COMPETITION

Under competition, distribution is in proportion to factor productivity. The factors in production are human effort, land, and capital. Human effort is the recipient of wages and profits, land yields rent, capital draws interest. Consequently, a per-

⁴ *Infra*, pp. 20 and 22.

⁵ International or inter-society relations raise the question of group survival. Is the doctrine of equal opportunity to have a cosmopolitan application? Clearly not, for the prime purpose of a society is to live. We may illustrate with immigration. Laws which permit unrestricted immigration merely shift from one group to another the care of the economically unfit. To the extent that this is permitted a group weakens itself. As a general rule, immigration should be restricted with reference to all classes in which income is inadequate. Nor is there anything humane about unrestricted immigration. It certainly cannot be called humane to visit the calamities of foreign indiscretion in propagation on the heads of the more discreet members of another society. We may illustrate again with the tariff. A tariff which merely contravenes the working of the law of comparative costs cannot be supported. But a tariff which prevents the importation of harmful goods conserves social strength, and a tariff which insures the production of commodities necessary in time of war is beneficial.

son's income depends on his relative efficiency as a producer and on the amount of land and capital that he owns.

In so far as income depends on personal productive power it is fair; in so far as property has been acquired as a result of personal ability of a productive sort that also is fair, and the income received from it is fair. In so far as property has been acquired in any other way, it has been unfairly accumulated, and the income it yields is unfair. Thus competitive value, as now determined, is not fair value. It can be made so only by eliminating all the unfair methods of securing property.

Property may be accumulated unfairly in the following ways: (1) through fraudulent competition, (2) through monopoly, not purposely maintained for social purposes, (3) through unreasonable ownership of land, (4) through undue inheritance, and (5) through uneconomic wage contracts.

PROPERTY AND FRAUDULENT COMPETITION

It is obviously impossible to say anything about the value of a good unless the quality of the good is known. The doctrine of marginal estimates, or price offers, becomes meaningless unless the good estimated is what it purports to be. With the separation of producer and consumer and the growing division of labor, it is impossible for the consumer to know the quality of commodities. Therefore, various service regulations are necessary. The object of these limitations on the right of private property is not to tell a person what to buy, but to tell him what is being bought. Consequently, we have pure food laws, standard weights and measures acts, enactments to secure financial responsibility in the case of fiduciary institutions, blue sky laws, and publicity requirements in the instance of corporate securities, and many others. All forms of fraudulent goods and careless services must be eliminated before we can talk of fair value. Fair value thus implies equal opportunity to purchase.

There can be no approximation of equality of opportunity if fraudulent competition is permitted. Productive efficiency means nothing except as we compare two producers of the same goods, or substitutes, of known quality. If one enterpriser drives another from the field by lowering the quality of pro-

ducts, all concepts of fair value are distorted. In a simple economic system, competition may result in improved quality at lower prices but in a complex system property definition of a restrictive sort is necessary.

PROPERTY AND MONOPOLY

We will consider natural monopolies first. It has been pointed out that monopoly price is fixed so as to yield the highest net return. Ordinarily, there accrues to the monopolist a surplus above competitive profits. Since this surplus is due to exclusive position, and not to personal productivity, it is an unfair income.

Put otherwise, the monopolist withholds supply in order to secure maximum profits. For instance, he may be able to make a legitimate profit by selling 100,000 units of supply at \$5 a unit. But he may be able to make a greater profit by putting out only 50,000 units at \$20 a unit. In so far as output is thus limited, human effort is forced into less productive fields. As a result of this, the state fails to get the maximum return from its resources.

Society, however, may remedy this condition by fixing the prices at which monopolized goods are sold. For example, price may be fixed so as to eliminate the surplus which appears when only 50,000 units are produced. If this is done, the monopolist can increase his personal income only by enlarging the plant, and this he will do. This means the maximum economy of productive agents.

Of institutional monopolies, there are two kinds, namely, those which conserve social interest, and those which do not conserve social interest. In the first group are institutional monopolies arising from patents, copyrights, trade marks, etc. Patents are granted on the ground that they encourage invention, which in turn, increases the productivity of labor. With proper limits as to the time for which the patent may run, therefore, the patent monopoly is economic. Copyrights stimulate authorship. Despite the waste in advertising brands, trade-marks make so strong an appeal to productive effort that there is good ground for them. The mintage monopoly in the hands of government

is beneficial, for a sound monetary system is fundamental in the productive process.

In the fields of business in which destructive competition is likely to occur, monopoly through agreement may prevent much waste of capital. Such monopolies should be definitely legalized and supervised.

In the second group are institutional monopolies arising from public favoritism, private favoritism, and unfair competitive practices of all sorts. These monopolies do not serve any useful purpose. There can be no justification for special tariff provisions which merely foster monopoly. It is impossible to defend favors granted by natural monopolies, such as railway rebates, or privileges given by institutional monopolies, such as collateral patent agreements. Unreasonable factors' agreements, local price cutting, and a host of other competitive practices are without economic foundation. All these things are subversive of the principles of equal opportunity.

Since these monopolies are based on institutions, society may reshape the institutions in such a way as to destroy them. A scientific adjustment of the tariff would break up tariff-made monopolies. The revocation of patents is a common way of dealing with uneconomic collateral agreements. Local price cutting may be prevented by providing that prices may not differ by more than the cost of transportation. All these things should be done.

PROPERTY IN LAND

The primary difference between competitively determined values and monopolistically determined values rests in the fact of supply limitation. It matters not whether there is a natural or an artificial limitation on production. Under competition, free reproducibility is the rule, and production is carried to the point where value normally equals expenses of production on the margin. In the case of monopoly, free reproducibility does not prevail and value may be far above expenses of production. In the case of land, also, free reproducibility is absent. We have now to inquire into the effect of this fact on personal distribution.

From the private point of view, since the normal return to investment in land cannot differ from the normal return to other competitive investments of a similar degree of risk, there is no such thing as an unearned increment from land. There are, of course, extraordinary gains in some cases, and there are large losses, but these occur in all competitive fields, so that land does not differ in economic significance from other investment opportunities.

From the social point of view, the whole affair looks different. Mere ownership of land, and the consequent receipt of rent, is not in accord with the doctrine of personal productivity distribution. Under accepted theories of margins, a competitive producer can increase his income only by lowering marginal expenses of production, and this conserves social interest. But rent is price determined, and rents rise only with the increase in marginal expenses. This rent surplus is not a monopoly return, but a differential income which depends on the peculiar nature of land supply, namely, its fixed amount. It is unlike differential returns which may accrue to capital and ability in that it is permanent. Thus it effectually makes impossible distribution in proportion to personal productivity.

Moreover, although rent does not enter directly into price, nevertheless, it is true that the public receipt of rent would lower prices. If all rent accrued to society, taxes could be lowered. Since taxes are expenses of production, the removal of such expenses would lessen marginal expenses of production.

One should not, however, conclude that public ownership of land is desirable. It is not. In the first place, public ownership would necessitate some sort of leasing system. This would involve much friction and more expense. In fact, it is quite possible that the expense of administering a leasing system, in a country of any extent, would entirely offset the advantages of public control. This consideration would apply more forcibly to agricultural lands than to urban lands where the limited areas would greatly lessen the relative expense.

More fundamental, however, is the psychology of land ownership. A comparison of tenant cultivation with ownership cultivation will inevitably lead to the conclusion that private owner-

ship is economically desirable. Moreover, the integrity of the family requires some private ownership of land.⁶

Thus, although the private ownership of land prevents the full realization of equal opportunity, more weighty considerations demand private control. But these considerations apply only within certain limits. It is not necessary that a person should own \$1,000,000 worth of land in order that society may have the benefits of the productive appeal inherent in land ownership.

Thus we have a conflict. From the standpoint of distribution, private ownership of land seems undesirable, from the point of view of production, it is requisite to the most economic use of this natural agent. The solution seems to lie in the direction of limitation of the amount of land a person may own. This would diffuse the rent surplus at its source and tend to increase ownership cultivation. Both results are desirable.

In carrying out this policy, farms of the most efficient size, the most effective relations between capital and land in industrial pursuits, and the amount of land necessary for home purposes, would be controlling criteria. With the growth of population and the consequent need for more intensive cultivation of agricultural lands, and with the changing relations between capital and land industry, there would be a continual redefinition of size. This could only be done, of course, in a rough sort of way. The method of controlling size would probably be a graduated land tax.

In summary: private ownership of land is fair only to the extent that it is necessary to stimulate men to produce. The amount of land that an individual may hold must always be decided in the light of agricultural and industrial efficiency. This is obviously no simple matter, but it is possible to approximate much fairer conditions than now exist.

PROPERTY AND INHERITANCE

From the point of view of distribution, inheritance cannot be defended. It is in harmony with the principles of equal op-

⁶ The singletax program, in its emphasis on distribution, fails utterly to note the effect of public ownership of land on production. It is, therefore, a retrograde movement.

portunity that all men should possess wealth in precisely the proportion in which they produce it. Inheritance distributes wealth among men in accordance with the chances of birth. As an evidence of the fact that this is an uneconomic system of distribution is the non-productive leisure class. Members of this class have inherited wealth, but they are disposed to use it for luxurious consumption rather than for the improvement of the productive organization of society. Thus is human power either wasted or misdirected. Additional evidence may be adduced. Even where inheritances are not so large as to create an idle class, they impose a series of handicaps on producers. For example, the man who inherits \$1,000,000 or \$10,000 has an economic advantage over him who inherits nothing. This prevents the full play of personal ability in productive pursuits and brings about an economically bad subversion of the principles of equality of opportunity.

However, inheritance may be defended. There is a powerful incentive to productive effort inherent in the institution. The desire to provide well for one's family after one is gone is strong in most men. Since it is unquestionably one of the most important motives to accumulation, inheritance is socially wholesome.

Therefore, we see that as a distributive system, inheritance is indefensible, but as a spur to productive effort, it is invaluable. The solution of this difficulty seems to lie in the direction of limiting the size of inheritances. But how large should inheritances be? This question cannot be answered categorically. It is probable, however, that the appeal to productive effort embodied in inheritance consists chiefly in the desire to place one's family in a relatively good economic position. Therefore, if \$50,000 or \$100,000 happened to be a large fortune, it is quite likely that the head of the family would strive just as hard to acquire that amount as he now strives to accumulate more. It is all a relative matter. At least, there is no justification for the inheritance of fortunes large enough to create a non-productive idle class. A progressive inheritance tax would accomplish the desired result.

It is sometimes urged that an inheritance tax dissipates

capital. The fundamental principle of this argument is that large fortunes promote saving and that widespread distribution leads to consumption. There may be some truth in this, but there is a counter contention that equal opportunity would develop thrift and frugality. If we are right in the assumption that there is just as much appeal to productive effort embodied in \$100,000 where \$100,000 is a large fortune as there is in \$1,000,000 where \$1,000,000 is a large fortune, it seems quite improbable that an inheritance tax could have much effect in dissipating capital. And it seems quite certain that the wider play of the appeal, incident to the establishment of equal opportunity, would develop frugality and thrift. If there is an appeal to productive effort in the institution of inheritance, it should lie to all members of the group.

Whatever may be the relative strength of the two forces, it is hardly probable that there would be a decrease in saving which would offset the increase in productive effort due to the attainment of personal productivity distribution. As a matter of conjecture, we do not believe there would be any decline in saving, but this we cannot prove any more than the apologists of large fortunes can prove the opposite. The same reasoning would apply, obviously enough, to a graduated land tax or to any other measure the object of which is to bring about personal productivity distribution.

In summary: the doctrine that an inheritance tax will dissipate capital is erroneous. Inheritance should be limited to the amount necessary to stimulate the appeal to productive effort embodied in the family.

PROPERTY AND THE WAGE CONTRACT

Contract is static, cross-sectional. Through it, all the inequalities of the existing economic order manifest themselves. These inequalities may be personal or institutional. As far as they are personal, it is not for society to attempt to control them, except where education is concerned. As far as they are institutional, they ought to be eliminated. This is the object of destroying fraudulent competition, of fixing monopoly prices,

of limiting the size of land holdings, and of limiting inheritances.

As a result of the existing institutional inequalities, the wage contract is uneconomic, except in a few cases where, through organization, productive power and contracting power have become identical. Ordinarily, as between labor organizations and organizations of capital, the advantage in contracting lies with the latter, although some labor organizations may be in a strategic position so strong as to throw the balance the other way. It is immaterial whether capital or labor happens to be in the stronger position as far as the social results are concerned. In so far as unequal contracting power exists, society is weakened. In the first place, the present fund of human productive ability is wasted because personal distribution is not in proportion to personal productivity. In the second place, as between generations, human power is not conserved. This ordinarily occurs through failure to maintain, or to improve, the physical, moral and intellectual standards of the people. This is the economic theory underlying limitations on the right of contract and personal liberty in such legislation as minimum wage laws, laws regulating the hours of labor, arbitration enactments, etc. In other words, these laws are an attempt to approximate the results that would exist under conditions of equal opportunity.

Property acquired as a result of unequal contracting power based on institutions is unfairly acquired. Obviously, the uneconomic inequality in the wage contract is a result of the existing unfair methods of getting wealth. Although a derivative problem, it is of sufficient importance to be classed as an independent method of uneconomically acquiring wealth.

PROPERTY AND THE METHODS OF ACQUIRING IT: SUMMARY

Property may be defined as the exclusive control over an economic good. Property, *per se*, then, cannot be in contradiction with the doctrine of equal opportunity. Under conditions of equality of opportunity, the amount of property that an individual could accumulate would be proportional to his productive activities. Moreover, the appeal to productive effort in-

herent in the right of ownership would induce the maximum expenditure of effort. Consequently, private property, as such, promotes social welfare.

But private property may be in contravention of economic welfare. This is true when it is unfairly acquired. The attack, however, ought not to be made on property, but on the unfair methods of acquisition. As has been stated, the unfair ways of securing property are (1) through fraudulent competition, (2) through monopoly, not purposely established for social reasons, (3) through unreasonable ownership of land, (4) through undue inheritance, and (5) through uneconomic wage contracts.

Economic welfare can be obtained only by destroying these unfair ways of accumulating wealth, for in this manner only can personal distribution be related to personal productivity, and the maximum economy of productive agents be secured.

EQUAL OPPORTUNITY AND LARGE SCALE PRODUCTION

We may call attention here to the effect of equal opportunity to produce on large scale production. Undoubtedly, large scale production carries with it many economies. It is one way of conserving human ability. It is, therefore, economically desirable. Would equal opportunity to produce affect deleteriously large scale production?

At the present time, large businesses are financed by means of borrowed capital got through the sale of securities. The machinery for collecting capital would not be adversely affected if equal opportunity prevailed. Banks, insurance companies, exchanges, etc., would still afford investment machinery. Consequently, it seems unlikely that there could be any deleterious effect on large scale production. The fact is, there would be a closer correspondence between the size of a business and productive efficiency. Overgrown concerns could not exist, nor could inefficient ones be carried by means of trust organization.

Moreover, if government eliminated fraudulent competition for capital funds, by thoroughly regulating securities issues, investment conditions would become more stable in proportion. Since this would induce capital formation, it seems that equal opportunity would promote large scale production.

One may point out the fact that it may be desirable to require securities issues in small denominations in order to afford wider investment opportunity. This would be especially true in the case of the so-called public utilities where investment is more likely to be stable than in the case of highly competitive businesses.

Large scale production does not necessarily mean destructive competition, but in certain large scale industries, where capital is highly specialized, destructive competition is likely to occur. This always implies uncertainty in the employment of labor and capital, and does not secure the maximum economy of productive agents. Some sort of legalized pool, fashioned after the German cartel, with binding contractual features and freedom of businesses to enter the pool and to leave it, may serve to maintain equal opportunity and, at the same time, do away with the danger of cutthroat competition. Such a pool should be under strict governmental regulation.

THE IDEAL AND ITS APPROXIMATION

The ideal economic system, viewed from the present, is that degree of equality of opportunity consistent with the appeal to productive effort inherent in property and inheritance. The problem, then, becomes one of constructive adjustment. The economic iconoclast performs about as well as the proverbial "bull in a china shop." If there is one well-attested fact in history it is that great economic changes take place slowly. Any radical alteration of institutions assumes that human nature can be changed over night and that institutions are mere ephemeral things. Both assumptions are fundamentally false. Consequently, the approximation of the ideal must be gradual and evolutionary, not radical nor revolutionary.

The methods of approximation are two: first, institutions may be defined directly and personal distribution thus related to personal productivity, or second, value may be fixed directly and personal distribution thus related to personal productivity. In either case, the maximum economy of human and natural resources is secured.

That immobility of production agents, degrees of personal

efficiency, and variability of industry are complicating phenomena in approximating the ideal is plain. This only means, however, that a public policy cannot be worked out with theoretic nicety. But many problems may be roughly and justly solved. What should be the nature of property, of inheritance, of contract, what ought to be the relative strength of competition, of monopoly, of government authority, in order that personal efficiency and social economic service may manifest themselves and receive economic rewards accordingly? With the growth of society, there must be a continual redefinition of institutions and of the scope of play of economic forces. We have, then, a constantly progressive attempt to reach a constantly receding goal—a goal which is always the same in that its essence is justice between men where justice is interpreted in terms of social strength.

FAIR VALUE AND MONOPOLY

The approximation of fair value involves the elimination of all unfair ways of acquiring property. The particular problem to which this monograph addresses itself is the elimination of the unfair acquisition of wealth through natural monopoly. More specifically, the problem is, what price of monopoly goods will relate monopoly income to personal productivity?

CHAPTER II

THE THEORY OF REGULATED MONOPOLY PRICE

In the preceding chapter the general theory of fair value was developed. In the present chapter we take up the particular problem of fair value under conditions of natural monopoly. We shall limit the discussion to the railway business.

THE OBJECTIVE CRITERION OF FAIR VALUE

The presence of monopoly signifies the absence of equal opportunity and, therefore, of personal productivity distribution. This does not conserve social welfare. However, society may remedy this condition by directly fixing the value or price of monopoly goods or services. But, by what sign are prices to be determined? It is not possible to judge the productive power of an individual by inspection, nor can the fair value of a good be ascertained by looking at it. There must be some objective criterion of fair value.

It is sometimes said that competitive value is fair value, but this is untrue. If competition were synonymous with equal opportunity to produce, or with that degree of equal opportunity consistent with the appeal to productive effort embodied in property and inheritance, wealth distribution would be in proportion to individual productive ability, and competitive value would be fair value. But competition, under institutions as they are now defined, is not synonymous with equal opportunity, and competitive value is not fair value. It can be made so only by eliminating all the unfair methods of acquiring wealth.

Nevertheless, competitively determined value may be used as the objective criterion of fair value for purposes of fixing monopoly price. One reason for this is that no other test is available. A more significant reason lies in the nature of the

problem. If we use competitive value as the guage of fair value under monopoly, we put monopolistic producers and competitive producers on exactly the same footing. This will destroy the unfair element in monopoly.

With the gradual elimination of all the unfair ways of getting wealth, value under conditions both of monopoly and of competition would gradually approximate fair value. This is one problem; the elimination of the unfair element in monopoly is another; it is the latter problem which we are to study.

THE SPECIFIC PROBLEMS

The specific evils of monopoly are extortionate prices, discriminatory prices and inadequate service. The corresponding problems are: What aggregate return should a monopoly be permitted to earn? How should this aggregate return be collected from those persons who use the monopoly service? What is adequate service?

AGGREGATE RETURN

If competition prevails, the prices which a business may charge for its goods tend to yield a total return which just covers marginal expenses of production. Marginal expenses of production include wages of management, wages of labor, interest on investment, cost of raw materials, depreciation allowances, taxes, insurance and a recompense for risk. For some purposes, a more useful way of stating the general principle is as follows: ordinarily a competitive business can earn no more than a normal net return on the capital actually invested in the enterprise. This fact is indicative of equality of opportunity.

If monopoly prevails, prices are fixed at the point of highest net returns. Ordinarily, this results in a total return which more than covers expenses of production. In other words, a surplus above normal competitive net return usually appears. This surplus is symptomatic of the exclusive position of the monopolist—the position that social regulation attacks.

The relative rapidity with which capital flows into regulated

monopoly fields as compared with competitive businesses depends on the relative net return to investment. It is usually said that, in the case of regulated monopoly, the rate of return should be high enough to attract capital. This is merely a truism. It offers no criterion of prices. The fundamental consideration is: How much capital ought to be attracted? If all businesses were competitive, capital would flow into those productive enterprises where it was most needed, for the rate of return would be highest in those fields. But all businesses are not competitive, nor can they be made so. However, the result is the same under a system of price fixing which permits a monopoly to earn no more than the normal competitive net return to its actual investment.

Consequently, the fundamental principle in fixing monopoly price is that total return should just cover total expenses of production, or that a monopoly should be allowed to earn a net return to its actual investment equivalent to what the same investment would yield under competition. In this manner, distribution under monopoly conditions would be placed in precisely the same position as under competition. Thus, as between producers in competitive fields and producers in monopoly fields, equality of opportunity would be established.

INVESTMENT *versus* SPECULATIVE CONDITIONS

In competitive businesses, there are speculative as well as normal returns. It is clear that the element of risk, due to imperfections in the competitive system, results in a general level of expenses of production higher than would exist under more perfect competition. This means less than the maximum economy of productive agents. The elimination of risk is, therefore, highly desirable.

As far as possible, then, in the case of regulated monopoly, investment rather than speculative conditions should prevail. It is believed that the advisability of taking this position will hardly be questioned.¹ If it is economically desirable to attempt

¹ See Smalley, *Railroad Rate Control* in *Publications of the American Economic Association*, 3rd series, Vol. 7, p. 422. Mr. Smalley does not agree.

to approximate the results of competitive conditions for monopolies of recognized public importance, the unavoidable conclusion is that the results of the best possible competitive conditions should be basal. In this way only can the level of expenses be reduced to the minimum.

THE LEVEL OF EXPENSES AND THE LEVEL OF PRICES

If actual investment is made the basic consideration in expense levels, the effect of price changes must be considered. The fact that twenty or thirty years ago \$100,000 was invested in a business does not mean that \$100,000 measures investment at the present time. For example, suppose a competitive producer to have invested \$100,000 in an enterprise ten years ago, and suppose him to have kept his investment intact. If prices have risen twenty-five per cent during the period, the value of the business is now \$125,000. The decreasing purchasing power of money has established a new expense level which is twenty-five per cent higher than the old one. Of course, it is recognized that no such smoothness as appears in the illustration occurs in actuality, but the principle is clear. The producer is neither worse off nor better off relative to other producers than before. But if actual investment is taken as the standard of fixing monopoly price and no allowance is made for rising prices, the regulated concern would be placed in an economic position relatively bad. Should prices fall, the regulated enterprise would be in a position more favorable than ordinary investors in competitive industries. Consequently, original outlays ought to be affected by an index of price changes constructed of pertinent items, for in this way only can any sort of equality of opportunity be maintained between various producers.

METHODS OF COLLECTING TOTAL RETURN

Having determined that a monopoly should be permitted to earn an aggregate return equal to total expenses of production, we now take up the question: How collect this total income from those persons who patronize the monopoly? There are

two principal theories of collecting total earnings, namely, the cost of service theory and the value of service theory.

Before we discuss these theories, it will be helpful to explain what is meant by the law of comparative costs, or territorial equality of opportunity. This law is that each nation or community should produce those goods which it can produce relatively cheaper than another nation or community. Let A and B be two communities. If A can produce wheat at less expense than B, and if B can produce sugar cheaper than A, it is obviously advantageous for each community to specialize in that commodity which it can produce most efficiently. But suppose A can produce both wheat and sugar at less expense than B. It is still advantageous for A and B to specialize in the production of that commodity which they can produce relatively cheaper. Assume expenses of production as follows:

	A	B
Wheat per bushel	50 cents	75 cents
Sugar per pound	10 cents	20 cents

If A invests \$8 in production, it may secure 16 bushels of wheat or 80 pounds of sugar. The 80 pounds of sugar will exchange in B for 20 bushels of wheat. A can, therefore, get more wheat by producing sugar and trading with B than it can by raising wheat. On the other hand, if B invests \$8 in production it may secure 10 bushels of wheat or 40 pounds of sugar. The 10 bushels of wheat will exchange in A for 50 pounds of sugar. B, therefore, gains 10 pounds of sugar by specializing in wheat and trading with A. Thus both A and B gain by turning their productive effort into those enterprises in which they have a relative advantage.

In the above illustration, transportation charges were ignored. But transportation charges are expenses of production and must be considered. If they equal in amount the gain from trading, it ceases to be advantageous to engage in exchange. This makes each community produce all the things it wants, and seriously limits the total amount of goods that the community may have. On the other hand, if transportation costs are relatively insignificant in amount, trading is gainful. Low

costs of transport are, therefore, of tremendous economic importance.

Discriminatory rates are equally significant. If rates are made low on sugar but high on wheat, the benefits of trade are destroyed, for a community must pay for the sugar it wants with the wheat it raises. If there is no gain in shipping wheat it will not be shipped, and there is nothing to give in exchange for sugar. Hence, each community must produce both wheat and sugar, which is economically wasteful.

If equal opportunity to produce prevails, the principle of comparative costs becomes effective, and prices tend to equal marginal expenses of production. This conserves human power and natural resources. We may reverse the process. If prices of monopoly goods are fixed so as to equal expenses of production, the results of equal opportunity are obtained, and social welfare is promoted. It is true that we must use existing competitive expenses as the criteria of price fixing, and that competitive expenses have elements of unfairness in them, but this is the best that can be done.

The cost of service theory dictates rates based on the actual cost of transporting goods.² This system of rate making applies the doctrine of equal opportunity to railway tariffs. In other words, it promotes geographical division of labor. Consequently, to every locality is preserved the natural advantages of its location; to every entrepreneur, the fruits of his business ability; and to labor, the most productive opportunity for its effort. Put otherwise, the effect is to achieve conditions of equal opportunity in fields of economic effort other than the railway business, which means the maximum economy of production agents.

On the other hand, if rates are made in accordance with the value of service theory, some goods are charged more than the cost of shipment, and some less. This amounts to subsidizing some industries and to taxing others. It is, of course, specious to argue that some goods could not move at higher rates and

² Theoretically, of course, each commodity ought to be charged just what it costs to move it. In practice, however, it is convenient to group commodities of similar characteristics for purposes of fixing rates. This is the problem of classification.

that, therefore, subsidization is necessary. This begs the question. Where expenses of production are high, rates are made low; where expenses of production are low, rates are made high. Thus are the natural advantages of location destroyed and thus are business ability and physical effort forced into less productive pursuits. In short, the value of service principle is directly in contravention of the law of comparative cost. Since it restricts geographical division of labor, it means unequal opportunity to produce, and does not conserve social welfare.

But the matter may not be thus summarily dismissed. So far, we have considered the effect of the two theories on businesses which use the railway services. This point we now take up without regard to their effect on the utilization of the railway plant.

THE UTILIZATION OF THE RAILWAY

Before we can satisfactorily discuss the effect of rate theories on the utilization of the railway plant, it is necessary to point out the nature of railway expenses. Some expenses, such as wages of trainmen, outlays for fuel, switching charges, etc., vary approximately with the amount of traffic. Others, such as general administrative expenses, interest on the investment in road-way and track, etc., are practically independent of the volume of traffic. The former are usually called variable expenses; the latter constant expenses.

From these facts, it follows that the railway business is subject to the law of decreasing costs. Taken as a whole, railway expenses do not increase in proportion to tonnage. We may illustrate:

Volume of traffic (tons)	Fixed expenses (total)	Variable expenses (unit)	Variable expenses (total)	Total expenses	Unit expense (total)
1,000	\$1,000,000	\$1	\$1,000	\$1,001,000	\$1,001
2,000	1,000,000	1	2,000	1,002,000	1,002
100,000	1,000,000	1	100,000	1,100,000	11
500,000	1,000,000	1	500,000	1,500,000	3
1,000,000	1,000,000	1	1,000,000	2,000,000	2

Thus, when traffic increases from 1,000 tons to 1,000,000 tons, the unit cost of transportation decreases from \$1,001 to \$2. This relation of unit costs to traffic indicates the importance of fully utilizing the plant.

It should be noted, however, that this law is applicable only up to the point where the plant is fully utilized. After that point is reached, it becomes necessary to increase the investment and to enlarge the administrative organization. In other words, constant costs become variable. From a short time point of view, then, railway expenses are variable and constant; from a long time point of view, all expenses are variable. These facts are of vital importance in deciding which of the two rate theories is economic.

If all railway expenses were variable, it is unquestionably true that rates based on the cost of performing the service would secure the maximum utilization of the plant. Suppose an average ton-mile cost of one cent. At that rate, a certain amount of traffic would move; to charge more would merely curtail the volume of business and, therefore, would not secure maximum utilization; to charge less would increase the amount of traffic, but the railway could not meet expenses. It might, however, charge some goods more and some less which would diminish or augment traffic in the respective goods, and would not increase the aggregate business.

But if some railway expenses are constant, maximum utilization may be secured by carrying some commodities at less than average unit costs. Suppose the constant expenses are \$1,000,000 and that the total amount of traffic is 1,000,000 tons. In the average, each ton must contribute \$1 toward constant expenses. If 2,000,000 tons are moved, the constant costs per ton are \$.50. We may assume also that the unit variable cost is \$1. When 1,000,000 tons are moved, the total unit expense is \$2. When 2,000,000 tons constitute the traffic, the total unit cost is \$1.50. Suppose, however, that it is not profitable for producers to ship the second million tons at a \$1.50 rate. Rather than let the business go, the railway can afford to take it at \$1.25. This rate covers all variable expenses and leaves \$.25 per ton, or a total of \$250,000, which may be applied to constant charges. Since the

total constant expense is \$1,000,000, this leaves \$750,000 to be borne by the first million tons, or \$.75 per ton. That is to say, the total unit cost is reduced from \$2 to \$1.75. At this rate, more commodities would be offered for shipment. It is plain, then, that when some costs are constant, maximum utilization may be secured by carrying some goods below average unit costs.

This fact has been used to justify rather sweeping divergencies from rates based on the cost of performing the service. It is usually argued that rates which pay something over variable costs permit a desirable re-allocation of constant expenses, and that where the traffic will bear no more, it is economically sound to quote such rates. This account of the matter overlooks some important facts.

In the first place, it fails to recognize the fact that low rates at competitive points may merely divert traffic from one road to another in which case there is not a fuller utilization of the transportation system as a whole, and consequently there is no national gain. In the second place, it ignores the effect of rates on the location of, and the amount of capital invested in, particular industries. For instance, on the direct road, lower rates on competitive than on intermediate traffic will cause industries to locate in the competitive points that otherwise would be established in the intermediate points—in direct contravention of the law of comparative costs. Or, if rates are made so that a producing area far removed from a certain market may compete with a producing area not so far away, but having the same costs of production, capital is used with less than the maximum of productivity. Also, if rates on competing, or substitute, goods are not in proportion to the cost of transport, although the rates on such commodities may be less than on other commodities involving approximately the same expense to the railways, there is subsidization with the consequence that capital is diverted from more into less profitable enterprises. Or, if rates on raw materials and finished products, in a given case are not proportionate to cost of service industries will not be located at the points where natural advantages are greatest, with the result that production and exchange are diminished in amount. While, therefore, the law of decreasing costs does

justify rates which pay only something more than variable expenses, it may not be inferred, as is often done, that the principle may be applied indiscriminately or indiscriminately.

COST OF SERVICE *versus* VALUE OF SERVICE

Two general principles are clear: first, no service should be rendered by a railway for less than the variable cost occasioned by the particular service, for lower rates would amount to subsidization of the favored industry and prevent an economic development of business; second, the constant costs should be apportioned to the various services in proportion to the ability of each to pay them, for this will achieve the maximum utilization of the railway plant.

Railway rates, then, should be based partly on the cost of service and partly on the value of service—essentially, an application of the principle of competitive price under conditions of joint cost. For convenience, we may designate this the joint cost theory.

In using this theory, however, the effect of rates on the utilization of the railway system as a whole and the effect of rates on the location and character of industry should always be controlling considerations. An unqualified value of service theory is uneconomic; an unqualified cost of service theory is about as uneconomic. Used with discrimination, the two together give an adequate and economic theory.

ESTABLISHED ECONOMIC CONDITIONS

At the present time, rates are made in accordance with the value of service principle. Such rates are discriminatory, but on the basis of them, business has become established and communities have been developed. While it would be economically advantageous to have rates in harmony with the joint cost theory, it would be foolish to disarrange the present productive organization by suddenly changing rate schedules. However, the joint cost principle may be put into effect gradually. This would not materially affect present conditions, but it would direct future development along the lines indicated by the law of comparative costs.

APPORTIONMENTS

Due to the fact of joint expense many accounting difficulties are met in applying the joint cost theory. For example, if wheat and sugar are carried on the same train, how much of the expense is due to wheat? How much to sugar? How apportion joint expenses, such as wages of trainmen, expenditures for fuel, general expenses, interest on investment, etc., to specific units of traffic? These are complex problems, but not without solution.

Although joint costs are not directly assignable, they are logically and rationally so. The expense of moving a bulky commodity is greater than the cost of moving a less bulky one. It is more expensive, on account of the danger of loss, to carry articles of high than low value. Fragile goods cannot be moved as cheaply as unbreakable ones. And so on through the list we might go. It suffices to point out that it is not impossible to discover some way to allocate joint costs.

It is not maintained that this can be done with exactness. But no scientific development of rates is possible without some approximation of costs, and almost any degree of approximation would be better than the haphazard method now in use.

OTHER RATE THEORIES

The value of commodity, or taxation, theory has been proposed. Under this theory, commodities of high value pay high rates and commodities of low value pay low rates; this is a sort of illusory analogy to the ability to pay theory of taxation. But the value of a good is no criterion of its ability to pay transportation charges. The criterion of ability to pay railway rates is the difference in utility at the point where the good is made and at the point where it is consumed. Like the value of service theory, the value of commodity principle contravenes the working of the law of comparative costs. It restricts a full

* Mr. C. E. Schreiber, head of the Statistical Department of the Wisconsin Railroad Commission, believes that the error is not more than two per cent to three per cent in apportioning expense to passenger and freight. It is undoubtedly true that this Commission has done more than any other in the matter of cost analyses. I have these estimates from him directly.

development of geographical division of labor and, therefore, cannot be defended.

The fallacy of the value of commodity theory may be stated another way. Just as the joint cost theory implies personal productivity distribution, so the value of commodity theory implies distribution in proportion to need. In effect, this theory imposes high rates on luxuries and low rates on necessities. At any particular time, since the marginal utility of a dollar varies with the number of dollars that an individual has, this method of rate making would increase total consumers' satisfaction. That is, it would increase the real income of individuals with few dollars. This is its purpose, and this is essentially a need-distribution theory. As a general rule, distribution on the basis of needs cannot be supported, for it does not secure the maximum economy of production agents.

In view of the existing inequality in wealth distribution due to the various unfair ways of acquiring wealth, it may be that there is a defense for charging luxuries very high rates and necessities very low. But the defense lies in the domain of production rather than in the field of consumption. In so far as the result is to curtail the use of luxuries and to increase the real income of the less wealthy classes, it may promote industrial efficiency. It is clear that this is not a permanent defense, nor can there be such a thing. It is necessary to go to the root of the matter and to establish distribution on the basis of personal efficiency.

Other standards have been advocated, such as the utility theory, the postal theory, the keep-everybody-in-business theory, and various other modifications of the value of service and value of commodity theories. For the same reasons that the two main theories fail, the corollary theories fail.

SOME CASES IN WHICH THE COST OF SERVICE PRINCIPLE IS NOT ECONOMIC

There are some cases in which the cost of service principle does not promote public welfare. One may cite the instance of the post office. The general dissemination of knowledge and the convenience of a flat rate are so important in political and

economic welfare that the state may undertake the postal service without reference to the cost. This—a case in which self-interest promotes neither its own ultimate well-being nor the welfare of society—is so well established in economic theory that it suffices to call attention to it.

Although by no means a general rule, it may sometimes be well to undertake to supply pure water in goodly amounts at less than cost. The hygienic benefits of a plentiful use of good water are not necessarily measured in terms of what consumers are willing to pay. Generally, the cost of service principle should prevail in all so-called public utilities. The cases in which it does not, call for clear justification.

Passenger fares, either flat or zone, are sometimes sustained on the ground that they tend to relieve the congestion of population in the larger cities. Undoubtedly, there is economic gain from wholesome living conditions. Undoubtedly, the congestion of population in cities is economically bad. Undoubtedly, as a temporary relief, passenger fares of the zone or flat variety are economically sound, for they improve the moral, intellectual and physical efficiency of men.

But the fundamental causes of congestion are three: the maladjustment in the distribution of wealth; the survival of a rather crude doctrine of personal liberty which permits the use of harmful goods, chiefly intoxicating liquors; and low standards of living among certain classes, caused primarily by immigration. For the most part, these ultimate causes may be eradicated through institutional control and education. This done, it is probable that there would be no justification for passenger fares on any basis other than that indicated by the joint cost theory.

SERVICE STANDARDS

So far we have assumed service standards. We come now to the question, What is adequate service? This is a difficult question to answer. Theoretically, the standard of service is that service which would be established if the railways were competitive. In practice, however, it is necessary to fix some standard more or less arbitrarily. Some customary service is

inadequate. On the other hand, it is possible to have extravagant service. For example, a passenger service which would require ten cents per mile to cover expenses would be wasteful. Between the extremes of extravagance and inadequacy, a reasonable standard may be found. To do this, it is necessary to take into account the economic well-being of the people and the needs of production. Comfort, safety, and reasonable speed are controlling criteria in passenger service: rapidity of movement, security, and inexpensiveness are the important considerations in freight service. These factors cannot be put into algebraic form, but it is possible to determine approximately what standard is best suited to conditions.

CHAPTER III

VALUATION: THE DETERMINATION OF EXPENSE LEVELS

In the last chapter, the general theory of regulated monopoly price was developed. Prices should be fixed so as to permit the monopoly to earn a normal competitive net return to the capital actually invested in the business, or prices should be fixed so as to allow the monopoly to earn a total return equal to aggregate expenses of production. This may be called the investment theory of valuation. We have now to consider the elements which comprise aggregate expenses.

ELEMENTS IN EXPENSES

The determination of total expenses requires (1) the valuation of items, physical and non-physical, properly entitled to a return, (2) the valuation of operating expenses, or the standardization of operating costs, and (3) the valuation of the rate of return. In other words, what items, tangible and intangible, are properly entitled to a return, what value should be placed on them, what are legitimate operating expenses, and what is the proper rate of return?

PAST AND PRESENT CONDITIONS

The problem is complicated by the fact that a theory of fair value applicable to present conditions may have to be materially modified in its application to past conditions. It cannot be assumed with certainty that past and present conditions may be treated alike. For instance, the investment theory excludes all donated items from value. Such items represent no expenditure on the part of the monopoly, and no claim to a return

on them may be urged. As applied to the present, no objection to this contention can be maintained successfully. But to assume that a retroactive application is just is, at least, a rather violent assumption. Certain equities may have been established which justice must recognize. Consequently, we must always keep two problems in mind: What value will establish conditions of equal opportunity to produce in the present? And what disposition must be made of equities established in the past? Although it may well be that the equities are the result of past inequalities, we cannot remedy one injustice by creating another.

In general, we think it can be shown that any retroactive regulation is unjust. If this is true, the investment theory applies only from the beginning of regulation in any particular case. But the reasons for this conclusion are so varied, and the problem is so important, that we take it up in connection with the various items in valuation.

SUBSTITUTE *versus* PRESENT PLANT

Tangible items include capital goods and land. The investment theory includes only those tangible items that are properly chargeable to capital account under scientific accounting methods. Book value, inflated by unwise or fraudulent outlay, is not a criterion of investment. Only those expenditures which would normally afford a return under the full application of the law of comparative costs can be legitimately charged to the capital or counted in value.

This position may seem to lead to cost of substitute plant rather than present plant as the criterion of investment, but such is not the case. It is evident that to use cost of substitute plant as the controlling element would increase heavily the risks of business and thus raise the general level of expenses. And while the use of present plant as the basis of investment results in temporarily higher expense levels, the fact that certain risks are eliminated results permanently in lower levels of expense. Thus by adopting present plant as the basis of value calculations a sort of insurance is created. The temporarily higher expense levels, due to retaining the old plant, are

analogous to insurance premiums, and the policy has the same economic justification that all insurance has. Investment, therefore, is measured by present plant.

UNIT PRICES

A general problem of much significance is that of unit prices. What prices are to be used in fixing the value of items which are properly entitled to a return? Under the investment theory, actual prices at the time of construction may be used. If so, it is clear that the value thus obtained must be affected by a weighted index of price changes constructed of pertinent items. The same result may be obtained if present prices are applied to actual construction conditions. This method automatically has the effect of applying a weighted price index constructed of appropriate items and is, therefore, a superior method.

In applying present prices, sometimes an average is fairer than current prices and sometimes current prices are fairer than an average. The advantages of an average are obvious. Averages avoid extreme fluctuations in market prices and, therefore, tend to approximate closely the actual conditions under which normal construction takes place.¹ Avoiding price fluctuations is conducive to more stable rates—a most desirable condition²—while the using of current prices, which may be abnormally high or abnormally low, may work injustice to the consumer or to the investor.

One or two year averages reveal only surface fluctuations and usually mean frequent rate adjustments. Five or ten year averages disclose more significant price variations coincident with economic changes and are ordinarily favored.³ An average based on an assumed construction period seems to bear no particular relation to any significant fact and is, therefore, not of much importance.⁴ In fact, all averages may be unfair to

¹ Whitten, R. H., *Valuation of Public Service Corporations*, p. 202.

² *Hill v. Antigo Water Co.*, 3 W. R. C. R. 623, 639.

³ Whitten, *op. cit.*, p. 204.

⁴ Whitten, *op. cit.*, p. 206. Mr. Whitten here quotes from an Article by Gray, H. L., in *Engineering and Contracting*, May 3, 1911, pp. 520-1.

the regulated company. This case arises when prices are not merely fluctuating but show marked tendencies to rise continuously, as in the case of materials constructed from forest products. In this case, future conditions may be best cared for by using current prices. Such current prices would, of course, not be current market prices, but normal prices discovered by the use of projected curves.⁵

After all, the end sought is normal price. And while no hard and fast rule can be laid down, no great amount of investigation is required, in a particular case, to discover the usual or ordinary price of various sorts of materials used in a plant.

PHYSICAL ITEMS—THE INVENTORY

The first step in discovering investment is an inventory of the physical items used and useful for the public. We must find out what things are to be valued before we can value them. Moreover, the inventory may reveal items which do not represent any outlay on the part of the investor. On the other hand, expenditures made by the investor may not be revealed in the inventory. It is these problems we now take up.

INVESTMENT IN EXCESS OF PRESENT NEEDS

In anticipation of growing business, land and plant may be acquired in excess of immediate needs. In the case of land three possible ways of dealing with this situation present themselves. In the first case the excess land may be counted in value. The consumer takes the risk, and any appreciation in land should accrue to him and depreciation be borne by him. In the second case, the land may be excluded from value. Then the investor assumes the risk, and when the land is actually used it should be included at its full value at the time. In the third case, the land is entered in value at the time it is acquired, a full return is allowed on it, and appreciation is counted as income.⁶

⁵ Riggs, H. E., in *Proceedings of the American Society of Civil Engineers*, Nov. 1910, p. 1506.

⁶ This is the position of the New York Public Service Commission. See case of *Queens Borough Gas and Electric Light Company*, 2 P. S. C. 1st D.

This last position is obviously a compromise position. Theoretically, the first two are more tenable. Either the risk should be borne by the consumer or it should not. The cost side of the problem decides here. It would undoubtedly be very costly to regulate the purchase of land for future needs. Moreover, the delay incident to commission decision in any particular case might prevent the taking advantage of favorable conditions of purchase. We, therefore, think that land ought to be excluded from value until it is actually used and then counted at its full value at that time—as would certainly happen under normal competitive conditions.

In order to avoid heavy inadequacy charges, it is ordinarily necessary to build plant in excess of immediate needs. This excess plant becomes a legitimate part of capital account, and must be allowed in value. This, of course, assumes that reasonable judgment has been used in building for the future.

If a plant far in excess of any probable use for this or the next generation has been put up it falls under the head of unwise expenditure and is not allowed. The whole problem hinges on the question of reasonableness, to be interpreted in each particular case. Should it finally prove that the excess plant is not going to be useful in the service of the public, although a return may have been allowed for a time, it must eventually be excluded on the ground of unwise expenditure. This is merely a risk private enterprise must bear, and regulated business cannot escape the results of bad business judgment.⁷

INVESTED SURPLUSES

A surplus is an excess over a fair return. Theoretically, of course, invested surpluses have no place in value. Profits in excess of a fair return should be distributed to the consumer in lower rates, or, what amounts to the same thing, reinvested and considered as a sort of public trust upon which, of course, no return is to be expected, except a small one to cover entre-

⁷ *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 697.

Whitten, *Valuation of Public Service Corporations*, pp. 198-200.

preneurial costs of handling. Thus we do not invade investment; nor do we put any business in a position less favorable than it would be under normal competition. But, decidedly, we do deprive monopolies of their peculiarly exclusive position. As applied to the future this position will, undoubtedly, be accepted.

As applied to the past, other considerations enter to modify the above position. Invested surpluses have become the basis of relations between the public and the investor. They have been capitalized; benefits have been conferred; equities have been established.⁸ The excess put into improvements has reflected itself in the market value of stocks and bonds, and investments have been made accordingly. Retroactive invasion of these investments cannot be justified on the ground that consumers have paid more in the past than they would have been required to pay under proper schemes of regulation. Granted that they have, it is difficult to see how remedying past inequalities can be accomplished by creating new ones, and this is just what would happen if the investor is pillaged for the benefit of the consuming public. The end in view may be wrought by means of proper treatment of inheritance and property. Thus the innocent investor escapes, but the manipulator who has come out with a large fortune is finally reached. We conclude that past invested surpluses are to be allowed in valuations.

The question now arises as to the validity of permitting surpluses which are invested as public trusts. The main objections urged against the accumulation of such a surplus are (1) that it is provided out of excessive charges to the public for service, (2) that it tends to extravagance in operation, on the theory that close margins tend to greater economies, and (3) that it affords a way of giving exorbitant and unreasonable dividends to the shareholders by some form of distribution of the surplus from time to time.⁹

In so far as the first point is concerned, there are obvious advantages in the surplus: (1) it strengthens the credit of

⁸ *Spokane v. Northern Pacific Railway Co.*, 15 I. C. C. R. 376, 415.

⁹ *Report of the Directors of the American Telephone and Telegraph Company*, March 20, 1912, pp. 8-12.

the company by enabling it to make interest and dividend payments regular and dependable, (2) this enables the company to get capital for extensions, etc., on most favorable terms, (3) it enables the company to weather commercial and financial disturbances, (4) it enables the company to give the best quality of service in that it does not have to adjust more or less inflexible operating expenses to highly flexible income due to fluctuations in business; it is a reservoir supplied by a fluctuating stream of income, and enables the company to maintain uniform service and permanent operating force which lends itself to greater efficiency, and (5) it lends itself to stable rates, which is highly desirable:

There may be some truth in the second point. But under constant regulation there is no particular reason why interest charges and operating expenses should not be controlled in such manner as to prevent extravagance in operation. It should be no more difficult to control these expenses under the policy of allowing a surplus than it is to discover whether a surplus is being covered up in padded operating accounts where no surplus is permitted. Moreover, one may just as well assume that a possible surplus will be covered up as to assume that a surplus will lead to extravagance, for the result on rates would be the same. Furthermore, each position assumes the same degree of integrity in the management of a corporation. It is reasonable to assume that the usual \$50,000 man will run a business about as efficiently as he can, regardless of surplus. It may be true, then, that when returns are running lowest efficiency is most sought, but it seems equally true that the policy of allowing a surplus will not lead to any great degree of extravagance.

The third point is answered in the original question. The fund is to be regarded as a public trust or public investment, and no return on it may be expected by the public business.

This policy amounts in reality to forcing the public to purchase an interest in the regulated business. If the rate of return allowed the monopoly is adjusted, with relation to competitive businesses, according to risk, the effect on total expenses over long periods of time is nil. In general, since force implies

the absence of free exchange, it is doubtless, unsound to compel present consumers to provide funds which might be supplied as capital by the monopoly. Nevertheless, the beneficial results of the surplus seem to justify this particular policy.

DONATED ITEMS

As regards future policy, since donated items represent no outlay on the part of the regulated business, they should be excluded from value. But as regards the past, such items, in so far as they have become the basis of established equities, must be allowed.

ADAPTATION AND SEASONING

An old and seasoned roadbed is undoubtedly worth more than a new one. The criterion of this is the fact that maintenance expenses are less. Theoretically, of course, the earlier heavy expenses of maintaining and repairing roadbed may be looked upon as operating expenses, in which case actual cost would be the criterion of investment. Or, additional value due to seasoning may be considered as a proper capital charge, in which case no allowance for such expenditures would be made in operating expenses. The effect on rates would not be different in the two cases, but it is usually preferable, in order to spread costs over a long period of time, to avoid classing as operating expenses charges which may readily fall under capital account.¹⁰

As regards the past, since neither past earnings can be taken nor past equities disturbed, and since the lowered operating expenses have necessarily expressed themselves in the value of securities, nothing can be done. A valuation now must consider the roadway at its appreciated value. This would be determined by the amount of money put into the roadway whether the money came from earnings or capital. The position is exactly similar to that taken in the case of invested surpluses.¹¹

¹⁰ Whitten, *Valuation of Public Service Corporations*, chap. 16, gives the position of courts and commissions in this matter.

¹¹ Roadbed seasoning is peculiarly a transportation problem.

Plant adaptation also is a proper item in value. It is impossible to avoid imperfections in the building of a large plant. Expenditures for the purpose of adapting plant to function are necessary, and the amount of such expenditures becomes a proper expense and clearly ought to be allowed in value.

WORKING CAPITAL

The mechanism of modern business often requires a temporary excess of expenditures over receipts. The funds necessary to finance such a condition are called working capital, and obviously such capital is a proper cost of service. Some difficulties in finding the actual amount of working capital may be experienced, but there is no theoretical difficulty at this point. No questions of past and present arise, for this is always a present item. Consequently, no matter what theory of fair value one may adopt, whether actual cost, investment, reproduction cost or what not, the result would be the same in this case: the actual amount of capital necessary to finance the excess of expenditures over receipts.

EXPENDITURES FOR OTHER THAN RAILWAY PROPERTY

This class of items includes all expenditures made by a railway, or any other public utility, for items which are not a part of the utility business. Among them are expenditures for the elimination of grade crossings, paving, etc. If such expenditures are made by the utility they must be allowed in value—either in capital or in operating expenses. In either case, the result is to throw the burden of these civic improvements on those who use the utility, whereas many other people are benefited by the improvements and should bear a part of the costs. The practice has, consequently, no theoretical justification.

In the days of unregulated monopoly, justification for such a policy lay in the fact that a blanket tax on monopoly returns could not be shifted. Consequently, this was a means of getting a part of monopoly surplus, but under present conditions of regulation the practice is indefensible.

Since no equities can have been established on expenditures

of this sort there is no reason why they should be included in value, unless it can be shown that no fair return was earned by the utility prior to regulation. Such a condition indicates, not a tax on monopoly surplus, but a taking of reasonable profit. In general, the presumption is strongly against allowing such items. But in the present, if the practice is followed, such items must evidently be allowed in capital or in operating expenses; preferably in capital, for this spreads the burden of the payment over a greater body of consumers. However, if allowed in capital, the item would have to be amortized during the life of the items, or else the present generation would unduly pass charges on to future generations.¹²

CERTAIN HYPOTHETICAL ITEMS

Chief among these items are condemnation multiples and increased cost of reduplication due to expenditures on the part of states or municipalities.

Undoubtedly, the cost of right of way is a legitimate element in value. But this is no reason for adding some two or three hundred per cent of the estimated value of the land to cover hypothetical condemnation multiples. If these expenses were actually undergone, they should be allowed.¹³ It is quite true that a public utility is ordinarily compelled to pay more for land than its market value, which fact is of great significance in valuation. On the other hand, much land is donated. One cannot therefore argue with the reproductionists that, since at the present time it would probably require the multiples to get the land, it may be assumed that the multiples were used, or that, since a producer now entering the field would probably have to pay the multiples, they should be allowed to the existing company. Nor can one successfully argue that unless these items are allowed a competitor cannot enter the field. It is granted immediately that a competitor cannot enter the field. It is not desirable that one should.

There is only one possible way to deal with condemnation ex-

¹² Whitten, *Valuation of Public Service Corporations*, p. 167.

¹³ Whitten, *op. cit.*, p. 127.

penses, to wit: find out just what such expenses were and allow them.

Another important class of hypothetical items includes increased costs due to difficulties of reproduction. A city may have paved certain streets with the result that it would cost more now to reproduce certain parts of the utility plant than it actually did cost in the first place. When it becomes necessary to replace the part of the plant in question then these items may be taken into account.¹⁴

But to add an amount to cover potential costs of this sort is to allow a return to the regulated company above anything a competitive investor hopes for or gets. It is to establish unequal production opportunity. Moreover, the taxpayers put down the pavement and then the consumers pay the utility company for being so fortunate as to have such taxpayers in the community.

We have spent, probably, too much time on this item already. The contention need only be stated to show its utter ridiculousness. Such hypothetical items merely indicate the length to which the reproductionists will go.

APPRECIATION IN LAND VALUES

Aside from the appreciation in land value due to changing price levels of which we have disposed, there appears a large increment in value due to growth of population. Is this entitled to a return?

This appreciation may be treated in three ways: first, it may be capitalized and allowed in price; second, it may be counted as income or a reduced return allowed; and third, it may be excluded altogether, and a return allowed only on the actual investment in land.

A very brief consideration of the principles governing the valuation of land will furnish the answer to this problem. Land value is the sum total of the present worths of a series of discounted future estimated incomes. There are thus two elements in it: present income and estimated future income. When one sells land one capitalizes the estimated future incomes, and

¹⁴The classical illustration of this point is "pavement over mains".

when one buys land one pays for these capitalized incomes. Normally, the total return of land investments, composed of present income and estimated appreciation or depreciation, is about equal to the return to any other form of investment of a similar degree of risk. The full return is realized only by selling the land or by holding it until rents rise sufficiently high. In no normal case is the final amount obtained from land investment greater than the amount from any ordinary competitive investment.

It is clear that the first contention, capitalization of appreciation, permits a double return to public businesses, a return which could not be had under competition. The fact that it can be had in the case of regulated companies is indicative of monopoly position. To permit the appreciation is to capitalize monopoly situation. Since this is the very thing that equality of opportunity requires be abolished, there can be no justification for such policy.

A peculiar argument for allowing appreciation rests on the fallacy of competitive roads. The argument runs as follows:

"A failure to allow for such increment would be an injustice to a new competing line and would discourage competitive building. This is illustrated where a new company, in a given locality, say in a large city, would have to pay for necessary terminals several million dollars more than an older line with a similar amount of property, it being generally true today that the cost of securing right of way and terminals has greatly increased over former years. Other things being equal, in the process of rate regulation and competition, the rates charged by each being necessarily the same, if the older road were not allowed the increased value of its terminals to correspond with the new company, then its rates, based on the lower value, would, by competition, govern the new road, which would be deprived of reasonable returns on the value of its property. Such a policy of rate regulation would discourage competitive building, under such conditions, although the existing line might not be able to properly care for the business offering."¹⁵

This is one of the most perfect illustrations of illogical statement one may hope to find. It assumes the desirability of competition in the characteristically monopolistic railway business.

¹⁵ *Proceedings of the National Association of Railway Commissioners, 1910, p. 141.*

One is surprised to find the date of the statement as late as 1910. It establishes a permanent differential return which could not exist under competition where always the more efficient producer tends to drive the less efficient from the field. The truth is, if eliminating appreciation in land value would discourage competitive building most students of transportation would at once urge its elimination.

The second contention, that is, counting appreciation as income or allowing a reduced return, seems more sound. If the normal rate of return to investments is 8 per cent and if land appreciates at the rate of 5 per cent annually, investors can be found who will pay a price for the land which will give them a cash return of a little more than 3 per cent in the present. The return is a little more than 3 per cent because interest is charged on the unrealized income tied up in appreciation. In the case of utilities, it is argued that equal treatment is afforded if the same cash return is allowed as investors are willing to take. Appreciation is thus counted as income.¹⁶

There are serious objections to this method. In the first place, it involves the additional interest charges due to unrealized income. In the second place, it does not accomplish its purpose as can readily be shown by certain assumed figures. We may leave out of account interest due to unrealized income in the illustration. Assume the following conditions:

Land—	1890	1910	1930
Value	\$100,000	\$200,000	\$300,000
Income	10,000	20,000	30,000
Building, etc.—			
Value	\$100,000	\$100,000	\$100,000
Income	10,000	10,000	10,000
Present value	\$200,000	\$300,000	\$400,000
Total income	20,000	30,000	40,000

Suppose that \$200,000 in 1890 represents the actual investment, and assume, for mere ease in calculation, that ten per cent

¹⁶ *Steenerson v. Great Northern Railway Co.*, 72 N. W. 713, 718.

In re Gas and Electric Rates of the Queens Borough Gas and Electric Co., 2 P. S. C. 1st D. (N. Y.)

is a fair rate of return. In the illustration, land appreciates in value at the rate of five per cent per annum. Suppose a valuation made in 1910. Since \$300,000 represents value at that time, \$30,000 will be allowed as income. Of this amount appreciation will be \$5,000, or a cash return of \$25,000. This is $12\frac{1}{2}$ per cent on the actual investment of \$200,000. If the valuation be made in 1930, a cash return of \$35,000, or $17\frac{1}{2}$ per cent, would be allowed. Thus, counting appreciation as income does not seem to approximate the investment theory. Always, if the rate of appreciation in land value is less than the fair rate of return, and it must always be so, the method fails in favor of the regulated company. If one could conceive normal land appreciation at a greater rate than fair rate of return—under such conditions of course one would pay for the opportunity of investing in land and expect less than nothing as immediate return in cash—the method would be unfair to the public utility. It is only when the two rates happen to coincide that the method approximates the conditions of the investment theory. The two rates would correspond, in theory, when no immediate cash return is expected from land investment. In practice, the rate of return allowed public businesses should be equal to what could be had in other opportunities, assuming risk always. Since there is always, except in the case of unproductive land held for purely speculative purposes, some cash return to land investment, it is clear that the method is unfair to consumers of public utility services.

Moreover, the method would carry with it all the difficulties of corporate reorganization. It would not be difficult to reorganize and capitalize the appreciation in value. This might be prevented by accurate regulation, but there is no necessity for creating the problem.

The third contention, excluding appreciation in land value altogether, comes closer to meeting the requirements of the investment theory. In this case original cost is taken as fair value and a normal return is allowed. Since this is exactly what any investor in other enterprises gets in the normal case, it appears that equal treatment is attained.

However, if appreciation is excluded, depreciation must also

be excluded, and thereby a risk of business is removed. Thus not only do we eliminate the higher expense levels embodied in the other methods, but in a positive way reduce expense levels still further by eliminating an element of business risk.

With the gradual approximation of conditions of more equal production opportunity through the limitation of size of land holdings, agricultural and urban, another problem will arise in connection with public utility lands, especially railway rights of way and terminals. This is the problem of public ownership of the lands of public service corporations. To this problem we devote a chapter later.

DEPRECIATION

Machines, etc., wear out or become obsolete and must be replaced currently in part and finally in whole. Of the fact of depreciation there is no doubt. The relation this fact bears to investment is not so clear. The question is, and it is obviously one of large import, does cost new or cost minus depreciation represent investment?

The answer to this question depends (1) on the point of view in defining the relation of depreciation to investment; (2) on the nature of the business, whether or not there is a normal depreciated condition; (3) on the expediency of accumulating depreciation funds where normal depreciation exists; and (4) on whether or not the utility is regulated for the first time.

Depreciation is ordinarily defined as decline in productive power and depreciation fund as the amount necessary to keep the investment intact. The value of a production good depends on the estimated value of the final goods it can turn out during its lifetime. Since the capital good normally wears out and must be replaced, a fund for replacement must be created to keep intact the original investment. Depreciation is thus a cost of production which price must cover. For instance, a particular class of capital goods may have an average life of ten years and be capable of turning out goods with a net value of \$1,000 annually. The value of the capital good would be something like \$20,000 if the interest rate is 5 per cent. The gross income would have to be something like \$3,000 annually,

for approximately \$2,000 a year for ten years would be required to replace the machine at the end of its life. After five years of service, the machine would be worth only \$10,000 for it has only five years of productive life left. Its productive power, in other words, is decreased by one-half. Meanwhile a fund of \$10,000 would have been created and the investment would be intact.

Another formulation of the same doctrine may be made in terms of productive efficiency. Undoubtedly, if renewals are made promptly, productive efficiency remains constant after a condition of normal depreciation is reached. But if we consider the plant as new and then in a state of normal depreciation, we discover a decline in productive efficiency, for productive efficiency, significantly enough, is interpreted to relate to cost per unit output. It is well known that in the earlier years operating costs are less than after the normal depreciated condition is reached. If capital is amortized or if additions and betterments are made from a fund accumulated during these years, and no return is allowed on these improvements, while operating costs are increasing fixed charges are diminishing and the total costs per unit output may remain constant. In this sense productive efficiency may be said not to decline.

In this view, of course, cost new less depreciation would be the criterion of investment. It matters not what disposition was made of the fund. It may have been paid out as dividends which would amount to dividend payments out of capital, or it may have been put back into the business, in which case cost new less depreciation would tend to equal original investment, or it may be held as a fund which may be invested in outside securities or what not. The original investment has not been invaded in valuation. It seems all very simple that if property is half worn out, as it would be at the end of five years in the illustration we have been using, it represents only half the original investment. But is it so simple after all?

Clearly, the whole reasoning is from a market value point of view. Of course, no one would give as much for ten machines half worn out as for ten new ones. If one grants the point of view, and if a depreciation fund must be created to keep invest-

ment intact, the conclusions seem inevitable. But we are not seeking market value; we are looking for fair value. It may be that the two are the same, but this is, by no means, a necessary fact.

This leads us to discuss the nature of a business with normal average depreciation. In a business so large, and with such varied capital items bought at different times, as the railway business there are always some items about new and some items about ready for scrapping. That is, the railway business is always about half worn out. More accurately, if we take into account salvage value and dynamic conditions, the normal average depreciation may be said to be about 40 per cent.¹⁷

If we follow out the productive power theory we would have, assuming the same ten machines for purposes of illustration,¹⁸ a fund accumulated composed of the following amounts: \$20,000 for the machine ready for scrapping, \$18,000 for the machine ready for scrapping next year, etc., down to \$2,000 for the machine in use for one year plus \$20,000 accumulating during the year, or \$10,000 for the whole year. The formula $N(N/2)$ (average annual depreciation per machine) gives the same result. Applying the formula, or adding up the amounts, we have, after five years, a fund of \$100,000, or half the original cost. The figures, for simplicity's sake, disregard dynamic conditions and salvage value. Now it is perfectly obvious that under conditions of average normal depreciation an annual fund of \$20,000, without the accumulated fund of \$100,000, would easily maintain the efficiency of the ten machines. This fact has led some to deny the usefulness of an accumulated fund.¹⁹

Those who hold that the accumulation of a depreciation fund is unnecessary in the case of a business with an average normal depreciation must hold that there is no relation between mere aging, or even physical wear and tear, and the diminution of investment. Although from the productive power point of

¹⁷ The determination of the approximate percentage normal depreciation is an engineering problem. We may assume 40 per cent for purposes of discussing the economic results of an average normal depreciation.

¹⁸ *Supra*, p. 57.

¹⁹ Young, A. A., *Depreciation in Quarterly Journal of Economics*, Vol. 28, p. 630. See controversy between Young and Davis concerning the depreciation problem in *Quarterly Journal of Economics*, Vol. 29, pp. 378-395.

view the machines may be half worn out, the original investment may be intact. "When capital goods are installed their cost is a definite amount of investment; when they are retired from use the investment is diminished by the amount of their cost minus salvage. If the capital goods are replaced promptly when retired, is not the amount of the investment in every real sense kept intact?"²⁰

In the illustration we have been using, this view would require only \$20,000 annually and not the additional fund of \$100,000.

All would grant immediately that the fund must be considered, and cost new less depreciation be used to represent investment, if legally the fund was required. Two questions arise: first, is it economically expedient to require the fund, and second, in the case of newly regulated companies, is it just to assume that the fund has been or ought to have been created?

We take up the case of newly regulated companies first. Is fair value attained by using cost new less depreciation to represent investment? To use this basis is to assume that the productive power theory ought to have been in operation in the past. Certainly depreciation has taken place. Equally certain is it that depreciation is an operating cost. But no reason appears for assuming that a particular theory, however strongly one may think it suitable for the future, has been operative in the days of non-regulation. Whether or not depreciation ought to be deducted seems to depend on the facts in the case. If it has been customary in the past for businesses to accumulate such a fund which has been used for amortization or for extensions, it is probable that depreciation ought to be deducted. On the other hand, if it has not been customary to do this thing, and if no fund has been accumulated, there seems to be no good reason for deducting depreciation. It would seem that to do so would be to penalize business for the mistakes of government or the public. The question is one of fact.

Theory, however, may throw some light on the situation. As a matter of pure theory, it seems probable that under com-

²⁰ Young, A. A., *Depreciation in Quarterly Journal of Economics*, Vol. 28, p. 634.

petition, in permanent businesses where there is a normal average depreciation, potential competition would eliminate the accumulation of such a fund, for lowest expense levels would obtain. In the case of monopolistic businesses, theoretically, earning power would not be dissipated if the fund was never created. The theoretic fund might well have been paid out as dividends without in the least affecting earning capacity. It would not, therefore, amount to payment of dividends out of capital.

The question then becomes: What were the conditions of investment? Those who hold the productive power theory would maintain that the lower operating costs and the assumed higher profits during the earlier years, in reality, amount to a re-payment of investment. This, however, is not clear. It may be that these lower operating costs were a part of the total situation inducing investment of capital in the business. One cannot assume with certainty that operating costs should have been charged with any fund beyond that necessary to maintain properly the plant through repairs and renewals. It seems very likely, and it is backed up by a theoretical position, that current business policy did not require the accumulation of any such fund. In this view, original investment comes to be the criterion of fair value, and the productive power theory, with its deduction of depreciation, is cast aside.²¹

It may be, of course, that once a company is regulated, it is expedient to require the accumulation of a fund and to pass over to the productive power theory. This is one question. What has been in the past is quite another. The presumption is strongly against deducting depreciation in the case of newly regulated companies. In what seems to us sound, Mr. Allison says:

"In the case of an heretofore unregulated company it cannot be shown that the company ought to have set aside depreciation charges

²¹ Professor A. A. Young says: "It seems very probable, and properly so, that business policy was not framed to the marketability of capital assets. We cannot assume that where realized depreciation is easily and normally met out of operating expenses, and where unrealized depreciation in market value has not been charged to operating expenses, nevertheless, such unrealized depreciation is a virtual operating expense". *Depreciation in Quarterly Journal of Economics*, Vol. 29, p. 383.

to accumulate a fund equal to theoretical depreciation for such a fund would be useless. The conclusion seems clear, then, that in all ordinary cases of heretofore unregulated properties we cannot justly depreciate to obtain fair value unless we admit the justice of ex post facto laws or equivalent regulation or unless we interpret fair value to mean market value and not just amount."²²

In the event that depreciation has been allowed to go to the point of falling below normal, it seems, logically enough, that such depreciation should be deducted, for this is an evident instance of payment of dividends out of capital or of unfortunate investment, in either of which cases the investor should stand the loss.

It will naturally be argued by the productive power theorist that, although it may have been done innocently enough, profits have been overstated, dividends have in reality been paid out of capital, stated surplus is in part spurious.²³

However, it is believed that Professor Young is right when he says:

"In general, there is a reasonable presumption that the investment in the undertakings which have not accumulated a depreciation reserve were not made with the expectation that it would be necessary to charge accruals to operating expenses. It follows that it cannot in general be presumed that the profits of such undertakings have contained an element which should unquestionably be considered repayment of part of the invested principal. Accordingly, serious objection might properly be made to a system of accounts which requires that property already on hand be written down for depreciation."²⁴

The next consideration is the question of the expediency of requiring a fund under regulation. It may be well to announce the policy of requiring the creation of a depreciation fund in cases of companies under regulation. The validity of the policy hinges on the effect of the fund on the level of expense. If, returning to the same illustration, the \$100,000 fund is accumu-

²² Mr. Allison's position is found in Appendix A to the Report of the St. Louis Public Service Commission on the United Railways of St. Louis, p. 99.

²³ Mr. Davis takes this position in the controversy between Mr. Young and himself in *Quarterly Journal of Economics*, Vol. 29, p. 395.

²⁴ Young, A. A., *Depreciation in Quarterly Journal of Economics*, Feb., 1915, p. 369.

lated, either one of two things may happen. First, the fund may be used to amortize depreciation, and investment will decline to \$100,000. The public has paid a lump sum into the company which is to be regarded as a sort of public investment, in other words, it has purchased an annuity. Second, the fund may be used for extensions, etc., in which case the company investment stands at \$200,000 instead of \$300,000, to which sum the investment would have been raised had the company made the additions from new capital. Again the public has bought an annuity. If the rate of return allowed the company is approximately equal to competitive rates of return, it is obvious that the level of expenses would be unaffected. If, however, the rate of return allowed the regulated concern is larger than the competitive rate, it is clear that the result is a lowering of expense levels. The opposite theorem is valid. Under the theory of fair value here presented, rates of return under regulated monopoly and competition would be the same, and the level of expenses would, in the long run, be unaffected.

However, the distribution of expenses presents a difficulty. Obviously, the consumers during the period in which the fund was being accumulated would be in part paying future expenses. To what extent the present should thus endow the future is a delicate problem. In general, it is believed that each generation should pay the costs of the services it enjoys. From this point of view, then, one might well be justified in denying the expediency of creating depreciation funds under conditions of normal depreciation.

From this point of view, however, a distinction must be drawn between new companies and old ones with established credit. Businesses seldom spring complete into existence. If successful there is more or less rapid extension. It may be well under these conditions, before credit is well established, to require some sort of a fund, although it need bear no particular relation to theoretical depreciation. This is a case where necessary returns would be higher than under conditions of established credit and therefore the tendency would be to lower general expense levels. This having been done the company would soon reach the state of normal depreciation and would be in

the same position as old companies. This fund is not a depreciation fund in the sense that the productive power theory interprets that concept. It is a fund used to meet certain conditions prevalent in the early stages of a business. In fact, it is similar to the fund we believed ought to be allowed to cover up fluctuating receipts.²⁵

FUNCTIONAL DEPRECIATION

Functional depreciation may be defined as lack of adaptation to function. This sort of depreciation may be due to dynamic conditions which render a plant inadequate or to improvements which render it obsolete. Inadequacy ordinarily may be foreseen whereas obsolescence usually cannot. Consequently, it exists as a risk of the business. Risk involves expense and this expense must ultimately be paid by the consumer.

A very great difference, however, exists between obsolescence in competitive businesses and in regulated monopoly businesses. If, under actual competition, although this would not be true under perfect competition, an improvement renders a capital good obsolete, the producer is forced to replace the item. This is not the case under regulated monopoly. Unless the saving in operating costs is as great as the increase in capital charges due to the installation of the new machine, the old machine may well be continued in use. In this view, a capital good becomes obsolete only when its retention would maintain a higher expense level than would obtain with the introduction of a new capital good in its place. Unforeseen improvements need, therefore, present no difficulty. And since capital goods wear out rather rapidly, the substitution can take place without much delay.

Thus, although it seems impossible that obsolescence "mortality tables" can ever be constructed, regulation affords insurance against fortuitous changes. The premium would be represented by the temporarily higher expense level due to retaining the old capital good. This sort of insurance has the same economic validity as all other insurance: a permanent lowering of expense levels through the elimination of risk.

²⁵ *Supra*, p. 49, *et seq.*

This theory of obsolescence applies to a class of items usually treated under the head of discarded property. Usually in any large public utility that has been operating for any length of time there are certain items that have been discarded. For instance, a certain station site may have been abandoned. This will probably be held until it can be sold at an advantageous price. Such an item is really an obsolete item from the point of view of the public utility and must be excluded from value. Certain portions of the plant may have been discarded, but may be held for emergency purposes. If the emergency is a real one, such an item is a part of the cost of the service to the public, and it must be included in value. It is sometimes argued that it should be included at its emergency value.²⁶ In the case of a lot used for storage purposes, if a cheaper lot would do as well, it is probable that the value of the lot should be placed at the lower figure. For, reasonably enough, it may be assumed that the company will not discard items having left in them any appreciable degree of earning capacity. Under the theory of obsolescence outlined above when an item is discarded it is scrapped. Meanwhile, all renewals and repairs have been properly cared for. In order to keep the item in the business as a possible emergency item, it is necessary only to allow its scrap value.

Two facts tend to simplify the inadequacy problem in the case of railways: first, the size of the business and the variety of capital goods, and second, the relatively small units of capital goods.

The first fact results in what may be called partial inadequacy. For instance, it may become necessary to replace light with heavy rails, or less powerful with more powerful locomotives, but the replaced items are useful on divisions of lighter traffic or for sidings, switches, etc. Thus, although inadequate for one purpose, such items are entirely adequate for other purposes. Most items of capital in the railway business are of this character. Since on account of size, replacements are being constantly made anyway, the problem of inadequacy does not assume a very serious aspect. This sort of inadequacy may

²⁶ Whitten, *Valuation of Public Service Corporations*, p. 190.

be met easily from operating expenses, although the difference in cost between the new instrument and the old one should be charged to capital expenditure, for by so much it represents new investment. If this is not done no return should be allowed on the difference for it assumes the nature of a public investment. On the same grounds as before indicated, the distribution of costs requires that it be accounted a capital expenditure.

The second fact relates to saturation. Since inadequacy of this sort is overcome by additions of capital goods of the same sorts, there is no necessary scrapping. In the case of a gas company, for instance, the substitution of four-inch mains for three-inch mains requires the scrapping of the three-inch mains, for there is ordinarily no present use for them. But not so with the railway business. The addition of ten freight cars does not require the scrapping of anything. The fact of relatively small capital units thus greatly simplifies the inadequacy problem. Of course, such expenditures are charged to capital.

Some items of railway property do not fall under this position. If it becomes clear that a large station must be replaced in a short time on account of inadequacy, it must be provided for by the accumulation of a fund of sufficient size to finance the deal.

Some theorists have carried the functional depreciation idea to an extreme length in the notion of hypothetical functional depreciation. It is argued that particular items of capital lose in value each year because of the reasonable certainty that they will be superseded before the end of useful life. In the first place, such hypothetical depreciation does not represent any investment. In the second place, under the theory of obsolescence here suggested such replacements would be guarded against. And in the third place, even if one agrees with the general point of view, it is only when the actual supersession takes place that the old item is really depreciated.²⁷

Obsolescence often results from consolidation. The argument is advanced that a return should be allowed on the total

²⁷ This point is discussed in Whitten, *Valuation of Public Service Corporations*, p. 381.

investment in the constituent plants. This contention rests evidently on the assumption that all physical construction costs are legitimate elements in value, and is normally true. But if investment is high because of clearly unnecessary expenditures the case is one of unwise expenditure and no return is allowed. This seems to be the logical position to take in the case of super-session due to consolidation.²⁸

Accrued functional depreciation should be treated in valuation precisely as accrued physical depreciation. If the market value point of view is held, which we have indicated we cannot subscribe to, accrued depreciation would be deducted. But we hold that the fiscal history of the road should be appealed to and that investment should be determined as accurately as possible. If records are available it may be possible to show that functional depreciation should sometimes be deducted, but the presumption is strongly the other way. This may be irritating to the public, but it is just: the public fixed the rules of the game and it ought not to change them retroactively.

ABNORMAL DEPRECIATION

A class of items that presents many uncertainties may be called abnormal depreciation. For instance, a flood may wash away bridges, tracks, etc. Where this occurs in a non-flood district and is entirely unexpected, the loss should be borne by the investor, probably through assessment, as it is necessarily borne by other investors in various lines of production; where, however, the risk may in part be foreseen it will ultimately be borne by the consumer. It is probably better to bear it directly through slightly higher rates which will accumulate a fund which may be put into the property and held as public investment. Should the damage actually come and the property be destroyed the public loses its investment. Meanwhile, by taking the risk from private investors the level of expenses has been lowered.

Another possible way to treat such items turns on the question of responsibility. Since unforeseen losses of the sort men-

²⁸ *In re Application of the La Crosse Gas and Electric Co.*, 8 W. R. C. R. 138, 172.

tioned are due to no fault of the investor, it is argued that the investor should not bear the loss. The service is socially necessary and the consumer should sustain the loss. This position has merits, but it is not in line with the doctrine of equal opportunity. Under competition, the investor would bear the loss in a case of this kind. Under regulated monopoly, equal opportunity is established, if likewise the investor suffers the loss. The risk is so intangible that it is hardly possible to estimate it and lower returns accordingly, which would be necessary under the responsibility test.

NON-PHYSICAL OR INTANGIBLE ITEMS

So far we have considered the costs of physical items. There are several categories of non-physical items that must be considered. These sorts of items may be grouped as (1) overheads, (2) going value, sometimes confused with going concern value, (3) bond discounts, and (4) risk.

OVERHEADS

Overheads include such outlays as expenditures for engineering and superintendence, promotion and organization, contractors' profits, legal advice, contingencies, and loss of interest during construction. That such expenditures are necessary is clear. In theory, no difficulty is presented in dealing with these items. Actual bona fide outlay represents the amount that should be allowed in value. In practice, where it is possible to discover the actual outlays the problem is simplified. And as regards the future, accounting systems can obtain these facts. As regards the past, however, it is not always possible to get the actual outlay. Here it is necessary to estimate overheads, which is usually done by the comparative method. And although conditions are never exactly alike, and therefore the method is only a rough one, it has been found that anywhere from 10 per cent to 12 per cent of the inventory or physical value is usually a fair amount to allow for overheads.²⁰

²⁰ The Wisconsin Railroad Commission which has done more than any other in the matter of cost analysis and careful comparative studies allows this amount. See Whitten, *Valuation of Public Service Corporations*, chap. 12.

On the theory that overheads vary with the value of the physical items, it is sometimes argued that they should be depreciated in like ratio to physical depreciation. In case cost new less depreciation is adopted as the criterion of value this would be a logical corollary. In case cost new is taken as the basis of fair value, obviously no depreciation of overheads would appear. It is the same problem that was met in the case of physical depreciation. As regards the future, the point will be discussed under the caption "capitalization vs. amortization," and it will be urged that such items of expense should be capitalized.³⁰

In regard to the past, just as we hold that physical depreciation which is not below normal should not be deducted, so must we hold that overheads must be allowed at full value in rate cases. It may be urged that surplus profits represent an amortization of these non-physical items, but for precisely the same reasons that we set forth in the case of physical depreciation we are forced to conclude that this would be an example of retroactive regulation of an unfair nature.³¹ Since, if the physical plant should disappear there would be no source of income and non-physical items would be valueless, the position outlined can only hold to the point of normal depreciation. If depreciation has gone below the point of normal, investment has been invaded and overheads ought to be depreciated to the same extent.

GOING VALUE

Going value is often confused with going concern value, but there is good ground for careful distinction between them. Going value may be defined as the reasonable cost or financial sacrifice of building up a business which will yield a fair return upon the fair value of the physical and non-physical items in cost.³² Going concern value may be defined as the cost of creating an income. We may most easily clear up these defini-

³⁰ *Infra*, p. 83.

³¹ *Supra*, p. 57, *et seq.*

³² Erickson, Halford, member Wisconsin Railroad Commission, gives substantially this definition in a pamphlet on *Going Value*, Madison, 1914.

tions and disclose the vital differences in the two concepts by illustrations of the methods employed by advocates of the two theories. In the theory of going value the method employed is ordinarily called the original-deficits-less-subsequent-surplus-profits method. The plant is charged with all reasonable costs during the first year. To this amount is added the cost of extensions, interest on investment, depreciation, operating expenses, and sometimes land appreciation. Total earnings are then credited. The balance between debits and credits is regarded as the cost of the plant at the end of the first year; this amount is then carried forward as the cost for the second year and the process repeated until the year of valuation. If the amount exceeds the actual amount of money put into the business it is assumed that the company has failed to earn a fair return on the investment.³³

This method discloses the actual deficits during the period when the business is getting on its feet. Such deficits are unavoidable and are legitimate costs of the service. If the deficits are completely made up a reasonable return has been earned, while if they have not been made up completely a reasonable return has not been earned, which return should then be allowed in the future.

It may be asked with superficial show of reason why surplus profits are used to offset original deficits and not used to offset overheads or invested surpluses. The answer rests in the fact that deficits would be wiped out if subsequent earnings permitted. Ordinarily, deficits would be expected, and ordinarily it would be expected that they would be made up from earnings at a later day. If such is the case, and the deficits have been made up, the investor is treated fairly.

This method just covers the cost of building up a paying business where paying is interpreted to mean a fair return on investment. Since it, therefore, closely corresponds to what would happen under normal competition, and thus establishes equality of opportunity, it is the method sanctioned by the investment theory of fair value.

This method may give erroneous results unless great care

³³ Erickson, H., *Going Value*, p. 16 *et seq.*

is exercised in the choice of costs. For instance, in some cases full appreciation in land value has been allowed.³⁴ Since interest is allowed on this appreciation, the final result is to allow appreciation plus compound interest, at the assumed fair rate of return, on appreciation, which is manifestly contrary to all the principles of equal opportunity. The investment theory is satisfied only if appreciation in land value is excluded altogether.

Danger lies in the treatment of depreciation of capital goods. If the depreciation used in finding going value is the actual amount expended for renewals and repairs, the method results correctly. But if the depreciation used is the difference between cost new and cost new less depreciation, there is evidently a fund created by the consumers upon which they are compelled to pay interest and which in reality has never been expended by the company. Not depreciation fund, but actual payments for renewals, etc., should be used in finding going value.

An objection which, if sound, would invalidate the whole theory of going value is that the normal rate of return includes an amount which represents a return on the capitalized value of normal deficits. This assumes that under competition the marginal producer cannot amortize deficits, but can get only a normal return on such outlays. And while it is quite true that price would tend always to the lowest point, or that deficits would be capitalized and not amortized, for the great majority of competitive businesses these deficits are negligible, since the businesses begin in a small way and grow gradually. In the case of businesses which are established on a large scale, or which are monopolistic, deficits can usually be made up. Consequently, the normal rate of return does not include the capitalized value of any deficits.

In contrast with the theory of going value is the theory of going concern value. This theory is well expressed by one of its leading exponents as follows.³⁵

"Going value is defined as the value of a created income. While it pertains to the business rather than to the physical plant, it is never-

³⁴ *State Journal Printing Co. v. Madison Gas and Electric Co.*, 4 W. R. C. R. 501, 580.

³⁵ Alvord, J. W., *Proceedings of the American Water Works Association*, 1909, pp. 184-279.

theless true that in any just determination of the reproduction cost of a property it is as real an element in this reproduction cost as is the cost of reproducing pipe lines, etc. As a means of determining going value, the comparative method is suggested. This consists in an analysis of the relative net earnings or return to be derived from the existing plant as compared with that from a hypothetical 'comparative plant' which is assumed to be built on the date of valuation and to acquire the business of the existing plant in the territory served by it, as rapidly as possible, under non-competitive conditions. The sum of the present worths of the annual excess in net earnings, or return, from the existing plant as compared with those from the comparative plant, in the period of years from the date of valuation to the time when the earnings of the comparative plant can reasonably be assumed to equal those of the existing plant, is then the measure of the going value of the existing plant. *It represents the amount which the purchaser could afford to pay for the existing property with its established income, in excess of the value of its bare physical plant.*"⁸⁶

Put into figures, this last sentence means that if \$100,000 has been invested in physical items, if the annual return is \$20,000, and if the ordinary interest rate is 8 per cent, since the plant would be valued in the market at about \$250,000 the going value is \$150,000, for that sum represents the amount a purchaser could afford to pay for the plant with its established income, in excess of the value of its bare physical property. It is evident that this method assumes the whole point to be proved. It assumes that the existing income is fair. If that is true it is more or less a waste of time to find "going value." And it is certainly a perversion of logic to assume an income fair in order to prove it fair. The trouble with the method lies in the fact that it attempts to approach the problem of fair value from a value point of view rather than from a cost point of view.

The result of this method we call *going concern value*. *Going value* we use to refer to the results of the method which discovers actual deficits. This distinction is vital.

We need not delay the discussion to take up the conjectural nature of the developmental period. While it might be worth while to go into a discussion of this point if there were any semblance of validity in the so-called comparative method, it is

⁸⁶ Italics by the author.

so obviously fallacious that no good can come from showing up minor weaknesses.

BOND DISCOUNTS

Three elements may be present in bond discounts: brokerage charges, deferred interest, and poor credit.³⁷

Brokerage charges may be defined as the "expense necessary to be paid a reputable broker for making a full investigation into the costs and prospects of an inviting public service enterprise and a reasonable compensation for inducing his clientage to invest in well secured bonds and securities of such corporation."³⁸ This item is clearly a cost of the service to the public. All this assumes, however, that the relation between bonds and stocks is reasonable. If a company should attempt to finance its whole construction by bonds, this would, evidently enough, not be a legitimate financial transaction and bond discount would be excluded from value. Probably bonds should not often exceed 50 per cent of the total outstanding securities or rather investment. With the growth of regulation, this percentage may well rise to 70 per cent or even to 75 per cent of investment, for regulation should always have in mind the approximation of investment rather than speculative conditions for public utilities.

A normal brokerage charge is about 5 per cent of a bond issue. However, the actual brokerage charge paid must be the criterion of value. If the amount paid exceeds 5 per cent there is *prima facie* case against allowing the excess.

Aside from brokerage charges, discount may be due to monetary conditions. If the ordinary interest rate on well secured bonds is 5 per cent and bonds are issued at 4 per cent it is evident that such bonds would sell somewhere around 85. This sort of discount is equivalent to deferred interest payment. Interest at 4 per cent plus a fund accumulated to pay off the discount at maturity would amount to 5 per cent. The total payment made by the consumer would not be different in the

³⁷ Capitalized risk might appear in bond discount. But it is undoubtedly preferable to take care of this item under stock discount.

³⁸ Whitten, *Valuation of Public Service Corporations*, p. 268.

two cases. Fluctuations in the money market necessitate selling bonds below par. There can be no doubt of the legitimacy of such a transaction, and the discount should be cared for in rates.

The money market may fluctuate so as to cause bonds to sell above par. In this case the premium should accrue to the consumer who must pay the interest charges.

Bonds may sell below discount because of bad credit. In this case, if the discount is taken care of in capitalization or in rates, the poorer the credit of the company, the higher the capitalization or the higher the rates. In fact, the consumer should pay nothing for poor credit, no matter to what it may be due. If it exists, the investor should suffer any resultant loss.

Where outstanding bonds, or bonds and stocks, are grossly in excess of investment, no consideration should be given to bond discount in general. It is clear that bonds and stocks must bear a reasonable relation to investment before any general allowance for discount is legitimate. However, a reasonable brokerage charge on that portion of the bonds which do bear a reasonable relation to investment may properly be allowed.

FRANCHISES

In cases where franchises have been paid for openly by the public utility they must be allowed in value. The practice of charging for franchises is not general and should be discontinued for it is manifestly a vicious method of taxation. Since the function of a franchise is to guarantee investment permanency, it should be considered only in a purchase case.

RISK

Risk is a cost of production that must be paid by the consumer. This problem is treated in the section on the rate of return.³⁹

STANDARDIZED OPERATING COSTS

Aside from the determination of the investment in the plant, fair value requires the determination of current expenditure or operating expenses. The importance of this phase of valuation

³⁹ *Infra*, p. 78.

is evident when it is recalled that from 65 per cent to 70 per cent of the gross incomes of railways is used in operating expenses. The problem is: How determine if this expenditure is fair? This brings us face to face with the problem of efficiency. If the railways are run efficiently, the expenditures are fair; if inefficiently, the expenditures are unfair. If the latter condition prevails the question becomes: May regulation effectively take steps to penalize bad management? On the other hand, the question of rewarding exceptionally good management arises. Would the cost of such a degree of regulation completely defeat its own ends? Supra-marginal or sub-marginal management can be determined only if marginal costs are determinable. A question of much import then is: What are the methods by which marginal costs are determined? These are all questions of standardized operating costs.

Are the railways run efficiently? There has been much talk of late about the inefficiency of American railways, all of which has been summarized in the catchy expression, "wasting a million a day." The authority for this statement arrived at his conclusions by applying the results of certain experiments on the Atchison, Topeka & Santa Fe Railway Company to the railways of the country as a whole.⁴⁰ Conditions were exceptional during the time of these experiments, for a strike had just been closed, and high speed steel for cutting, etc., had just been introduced, both of which conditions would tend to lower costs materially. Moreover, certain units rested on the fallacious assumption that costs of repairs varied directly with weight, as, in the case of locomotives, it was assumed that one locomotive twice as heavy as another would cost twice as much to keep in repair. Consequently, not much reliance can be placed in the conclusions reached in this case.

Nor can one very satisfactorily compare railways with ordinary manufacturing plants and mercantile businesses in the matter of efficiency. Four reasons may be assigned for this: (1) the large area and extent of activity of the railways, (2)

⁴⁰ Mr. Emerson is the authority for the statement. See Cunningham, W. J., *Scientific Management in the Operation of Railroads* in *Quarterly Journal of Economics*, 25: 545 et seq.

the lack of uniformity in the nature of work in most parts of the railway business, (3) the necessity for continuous service in the railway business, and (4) the tactical position of labor unions, such as the Brotherhood of Locomotive Engineers. It is very likely that increased efficiency could be obtained by applying the principles of scientific management to some of the shops of railways, but this system cannot be assumed to be applicable to the railway business as a whole.

Even if it could, it would be unfair to assume that a system which is new, and in effect in less than 1/10 of one per cent of the manufacturing businesses of the country, ought to be in effect in that business—the railway business—where obviously its application would be most difficult.⁴¹

Unit operating costs will not furnish safe bases for efficiency determination. Such unit costs to be of service would have to be quite accurate, which would require a classification of roads, a classification of functions, and a classification of types. The latter two classifications would be easy enough to obtain, but the former is very difficult, if not impossible. The classification would have to take into account grades, curvature, density of traffic, directional density of traffic, nature of traffic, number of stops per mile of line and their distribution, water supply, and many others. Such a classification which would result in any considerable grouping seems utterly unattainable, and certainly would not be serviceable within sufficiently fine limits to afford statistics of efficiency.

Within very broad limits statistics of operation are useful. In the trunk line territory, for instance, one road may show a locomotive performance sheet with 13 cents per locomotive mile for repairs while the average for the territory may be only 8 cents. Such a condition would suggest inquiry as to the cause of the apparently excessive unit costs. For this and other reasons, statistical departments compile and disseminate information on every important detail of operation; the units are compared with the units of other roads, with divisional units, and

⁴¹ *Decision of the Interstate Commerce Commission in re Advance Rate case*, Feb. 22, 1911.

with units for other periods.⁴² Thus do railways check up unit costs.⁴²

Moreover, through various associations, such as the American Railway Association, the Master Car Builders' Association, the Master Mechanics' Association, and others, the railways practice free exchange of ideas and methods. These associations make careful studies of the most approved ways of doing things, and careful tests of the most approved instruments for doing them. One may cite the efforts of the Master Car Builders' Association and its experiments with the air-brake apparatus, or the efforts of the Master Mechanics' Association to develop a super-heater and mechanical stoker, or the efforts of the American Railway Association to establish a clearing house for inter-line car records. Thus in many ways are the railways achieving standardized conditions of operation and standardized costs of operation.⁴³

It has been pointed out that

"in the course of railroad development, there was first an era, which was the era of railroad building. Any railroad was better than a wagon road. There was next an era of coordination of the railroad service and finance to the commercial and financial conditions as a whole with which the railroads were called upon to deal. This was the time of traffic organization and railroad consolidation. Next came the era of internal adjustment on the physical and mechanical side: the perfection of machinery, cutting down grades, strengthening bridges, increasing the train unit. And now has come the era of sociological adjustment. The human part of the machine is quite as vital as the steel and wooden part in producing efficiency, and so in increasing income."⁴⁴

To meet this need the railways are pursuing an educational policy through changing organization, apprenticeships, and vocational schools. The effort here is to secure efficiency by developing men capable of performing the exacting duties of railroading.⁴⁵

⁴² Cunningham, W. J., *Scientific Management in the Operation of Railroads* in *Quarterly Journal of Economics*, 25: 556.

⁴³ *Ibid.*, p. 556.

⁴⁴ Eaton, J. S., *Education for Efficiency in the Railroad Service*, U. S. Bureau of Education Bulletin, pp. 1-11, 1909.

⁴⁵ *Ibid.*, p. 73.

That there are some evidences of inefficiency in the railway business is indisputable, but that the railways are less efficient, in view of the problems they must face and in view of the men available for railway service, than the average mercantile or manufacturing plant is very doubtful. That they are making laudable efforts to secure efficiency is clear: that they are tending to standardize costs is also evident, and the very process of standardization means greater efficiency. We have no way of telling with certainty just what is the status of efficiency, but we have good evidence that it approximates the average of efficiency in other lines of production.

Can regulation effectively increase railway efficiency? First, can this be done by supervision of operating expenses? It is doubtful if the government, or any one of its agencies, is in position to keep up with the progress of inventions, etc., as well as railway men. It would certainly necessitate large expense to do so. One may readily conclude that with efficiency approximating the average, the cost of any improvement, in so far as regulation is concerned, would offset any advantages. It would amount to substituting management for supervision and this is clearly out of the effective scope of regulation.

Through standardized reports, with scientific classifications of unit costs, regulation can assist in the development of standardized unit costs and thus in the development of efficiency. But further than this it cannot go. We conclude, then, that the operating costs of railways must be accepted as they are reported by the railways, and regulation be confined to securing correct and scientific reports.⁴⁶

THE RATE OF RETURN

Obviously, this is one of the most important problems in valuation. The large investment in public service corporations makes it very significant whether 5 per cent or 10 per cent be the rate of return. The question we now attempt to answer is: What principles govern the determination of the rate of return?

⁴⁶ Although the problem is not so complicated in the case of other public utilities, it is nevertheless true that regulation cannot go further than to secure proper reports.

The economic principles are not complex, but the practical application of them presents serious difficulties. Theoretically, the rate of return, assuming actual investment as the basis of returns, should be that rate which will draw into the public utility business that amount of capital which would flow into such businesses under the operation of the law of comparative costs. Certainly, if 20 per cent is used as the rate of return, there would be an over-expansion of railway building relatively to needs, and if 2 per cent were used there would come about a condition of stagnation and under-building relatively to needs. The test of the adequacy of a rate is whether railway building keeps pace with estimated economic needs.

This rate would correspond closely to the competitive rate of return with certain risk adjustments. But the importance of the railway business requires over-building rather than under-building, and care should be taken not to bring about a condition of stagnation. It is better to err in the other direction. From the practical point of view, a categorical answer cannot be given to the question: What is the fair rate of return? All that can be done is to point out the theoretical principles, and the practical tests, and then leave it to some regulatory body to carry these, as closely as can be, into effect.

There are several classes of investors. For present purposes, we may divide them into three classes: (1) the conservatives, who want a high degree of security and consequently are willing to take a low rate of return, or those who are willing to invest in bonds of well developed companies, (2) the semi-conservatives, those who will take some risk and who want higher rates of return, or those who will invest in preferred stocks and discounted bonds of fairly well developed companies, and (3) the speculative class who want at once high rates of return and prospect of increase in value of capital items, or those who are willing to assume initial risks if fair prospect of return is offered.⁴⁷

In financing concerns, all these classes of investors may at one time or another be economically appealed to, and regula-

⁴⁷ Allison, J. E., *The Rate of Return in Annals of the American Academy of Political and Social Science*, Vol. 53, p. 176.

tive policy must take them into account. No matter how thoroughly risk may be eliminated after a plant is well developed, the fact remains that the undertaking of new enterprises is always accompanied by more or less risk. It is, then, in the first instance to the speculative class that appeal must lie. Uncertainty as to what the initial investor may expect leads to failure to undertake initial risks. Regulative policy should, therefore, be definite in the matter.

Some believe that the solution of the problem of initial risks lies in capitalizing risk.

"At the present time there is almost a stagnation in the building of public service plants or railways due in part to the uncertainty as to what capital may expect as a reward for initial risks. If a group of capitalists should determine that a certain interurban would eventually pay, and if they were to foresee that they were under no circumstances to be allowed to earn upon this enterprise a return any greater than they could obtain from a similar already established business, it is difficult to imagine that they would undertake it. Even if a commission were to assure them that they would be permitted to earn a very high rate of return for the first few years, as compensation for the risk, the immediate answer would be that the circumstances of a new enterprise would probably prevent the earning of a high rate of return during the initial period even if permission to do so were assured. The investors, therefore, would conclude that they would have small chance of compensation for initial risk; for no matter how promising the enterprise appears, the element of risk in a new business is always present. As time goes on and as the regulation of private capital in public service enterprises is better understood, it will probably be found necessary to allow a lump sum capitalization of initial risk as an inducement to obtain the capital, and this risk allowance will be permitted to earn reasonable returns as if it represented real money placed in the service of the public, the returns to be permitted after the enterprise has developed to the point where they can be earned".⁴

This position is not agreed to by all. Some believe: "The original investor is entitled to a return commensurate with the risks of the initial enterprise. This higher rate of return should continue for a reasonable period; which period, however, may be reduced by reason of actual excess profits sufficient to compensate for initial risks,..... Public utility enterprises

⁴ *Ibid.*, p. 175.

are, however, built up piece meal, and upon the actual risk incurred in each successive extension or improvement depends the fair rate of return that should be earned for a reasonable period upon each particular increment of the investment. It may be said that in a well established and successful enterprise all the capital needed for improvements and extensions can be obtained at a low rate of interest. This is true. But, nevertheless, extensions and improvements cannot usually be made without risk to the existing profits of the enterprise. The new extension may not pay for a few years and there is also the risk that it may never pay. This risk is borne not by the new investor but by the investors who already have their capital in the enterprise, the returns on which may be jeopardized by the failure of the new extensions to develop the expected business. The fair return on the new investment should be measured therefore by the actual risk to the profits of the enterprise by reason of the new extensions rather than by the rate at which the bonds can be sold to secure capital for the extension. The higher rate of return commensurate with the initial risk should be earned on each separate increment of capital for a reasonable period and the rate should then drop to the rate that would be demanded by a new investor in purchasing the securities of the company.''⁴⁰

Both of these accounts of the problem recognize risk as a cost of production that must inevitably be paid by the consumer. They differ in the method of payment. The former holds out for capitalization of risk; the latter contends for rapid amortization of risk. The capitalization method makes a more definite offer in that it fixes a certain lump sum which is more tangible than the mere offer of higher returns, and therefore, has the advantage of certainty. It also appeals to investor psychology in that it offers opportunity for enhancement of property values. Stock bonuses, and the fact that \$100,000 worth of 3 per cent securities will sell for more than \$50,000 worth of 6 per cent securities, other things being equal, are evidences of this phenomenon. We do not attempt to explain this psychological fact; we merely note it. It may be urged

⁴⁰ Whitten, R. H., *Valuation of Public Service Corporations*, p. 709.

that the capitalization method distributes the cost of the service rendered by a railway, for instance, over a longer period of time and that from the social point of view, since those who come after are to use the plant, this is desirable. On the other hand, it may be said that the risk is a cost which does not embody itself in any physical item and disappears with the development of the company. It may be urged, therefore, that it ought to be paid by those for whom it is undergone, as other risks will have to be paid in the future by those for whom they are undertaken. This position might well be used by the capitalizationists, for they would merely say that the risk was undertaken for all those who use the plant, and in the case of permanent plants, risk should be spread over the whole life of the plant by capitalizing it.

Of the two methods, theoretically, it may be said that the one which offers greater certainty, other things being equal, is the more sound. This position would lead to the capitalization method. It seems to offer greater certainty, and, therefore, to eliminate some risk. From two points of view then risk should be capitalized. First, it tends to lessen the general level of expenses by affording greater certainty, and secondly, it spreads the total risk cost over the whole body of consumers for whom it was undertaken.

The appeal to all classes of investors tends to lessen the general expense level. The appeal is made, of course, through the issue of various grades of securities bearing different rates of return according to risk. By the speculative class probably a return of less than 8 per cent to 12 per cent would not be considered. The conservative class is willing to take 4 per cent to 5 per cent, but is unwilling to take the risk. Therefore, it would be impossible to finance a new enterprise, or an extension, at 4 per cent to 5 per cent, and it would be unnecessary to permit a general return of 8 per cent to 12 per cent as there is usually a percentage of the total investment which is secure enough to attract the 4 per cent to 5 per cent class. Thus by issuing various grades of securities it is possible, through risk allocation, to vary the rates of return in such manner that the level of expenses is reduced.

CAPITALIZATION VERSUS AMORTIZATION

We have passed in review the various items that should receive consideration in value. In every case actual cost has been the controlling criterion. Some of these costs are embodied in physical items and some represent outlays for non-physical items. The question we now propose is: What costs should be capitalized and what costs should be amortized?

In general, it may be said that each generation should bear the costs of the services it enjoys. The present should not endow the future, nor should it saddle the future with debts. In the case of physical items, the present generation of consumers obviously should pay no more than necessary to hand them on to the next generation in efficient condition. For this reason, of course, physical items should be capitalized. For this reason also the accumulation of a depreciation fund beyond that necessary to meet actual renewals, etc., is not favored. The difference between cost new and cost new less depreciation, as interpreted from the market value point of view, is thus not amortized.

In the case of non-physical items, they should be amortized during the life of the plant, for in this manner each consumer pays a proportionate share of these sorts of costs. But since public utilities are permanent businesses, it would seem that such items should be capitalized and not amortized.

In the case of brokerage charges amortization should take place during the life of the bonds, for otherwise there is a cumulative passing of non-physical costs to the future.

THREE THEORIES

Running through the discussion there are elements of three distinct theories: the investment theory, the cost of reproduction theory, and the market value theory.

The market value theory obviously denies the validity of rate regulation and, therefore, need not engage attention.

Of the cost of reproduction theory there are three types: (1) cost of reproducing the existing plant in the present, (2) cost of reproducing the existing plant under actual conditions

of construction, and (3) cost of reproducing an equally efficient substitute plant or utilizing new opportunities. Of the investment theory there are two types: (1) investment interpreted as a function of one variable, i. e., actual cost, and (2) investment interpreted as a function of two variables, i. e., actual outlay and changing price levels.

It is perfectly obvious that investment interpreted as a function of two variables and cost of reproduction under actual construction conditions come to the same thing. The results are believed to be socially good.

The substitute plant doctrine must be discarded since it results in higher expense levels than exist if present plant is used.⁵⁰ The cost-of-reproduction-under-present-conditions theory approaches the problem from a private point of view and fundamentally destroys equal opportunity in its treatment of land.⁵¹ The investment theory which fails to take into account changing price levels is subversive of equal opportunity.⁵²

⁵⁰ *Supra*, p. 44.

⁵¹ *Supra*, p. 53.

⁵² *Supra*, p. 32.

CHAPTER IV

FAIR VALUE AND THE MARGINAL RAILWAY

TWO MARGINS

Two problems present themselves. First, where two or more railways serve the same points, ought rates to be based on the expenses of the most efficient road? Second, is it possible to reward superior business efficiency in fixing railway rates? These are known as the extensive and intensive margin problems.

THE EXTENSIVE MARGIN

Remnants of competition in the characteristically monopolistic railway business give rise to the first problem. From the economic point of view, it would seem that, in the long run, the expenses of the most efficient road should control rates.¹ This would be a full application of the law of comparative costs, and would correspond closely to what would happen under normal competition, or under monopoly if monopoly were fully developed and regulated. Since it would mean, under present conditions, that the more inefficient roads could not be operated profitably, it has seemed to some that it is necessary to fix rates so as to cover costs of the less efficient railways. This would permit a price determined surplus, analogous to rent, to accrue to the supra-marginal road. There would be the same justification for diffusing such a surplus, through taxation or otherwise, as exists for diffusing all surpluses which arise from the fact of differential position or non-reproducibility.

¹ Of course, at any particular time, rates would have to be made high enough to cover costs on the differential roads necessary to handle existing traffic. The theory of competitive prices is here applied.

The contention that rates should cover costs on the marginal road may be disposed of briefly. In the first place, it would mean a contravention of the doctrine of comparative costs on a large scale and, therefore, an increase in general expense levels. In the second place, the policy of creating price determined surpluses would result in a vicious indirect consumption tax far removed from the fundamental basis of taxation. For these two reasons, rates based on the expenses of the marginal road cannot be justified.

Rates in this country are now so fixed as to cover marginal road costs which is a result of a misconception of the nature of the railway business.² Notwithstanding this, it is possible, by gradually changing the basis of rates to the costs as determined by the most efficient roads, to bring rate systems into accord with sound theory. Capital transfers could easily be made if sufficient time were allowed. Economically, such a transition is desirable and should become a tenet of regulative policy.

In the beginning, rates might be adjusted so as to prevent any expansion of the marginal road. Afterwards, a more thoroughgoing policy could be instituted. The result would be that the differential roads would become local and serve transportation needs in an economic manner—precisely what ought to happen.

If one could show that certain social and political considerations were of more importance than economic considerations, of course, the policy would be modified. For instance, the dispersion of population may be so desirable socially as to justify the extra cost involved in making rates on marginal road expenses. This would be analogous to costly tariff provisions which, entirely contrary to the principles of comparative costs, are justified for social and political reasons. The case, however, must be clear.

Certainly the present system which merely changes the lo-

²This condition is being perpetuated by the provisions of the Sherman Anti-trust law and the anti-pooling clause of the Interstate Commerce Act. Statutes, sooner or later, must recognize the essentially monopolistic nature of the railway business. Competition cannot be forced. Full monopoly, under government supervision, is the only feasible and economic development.

cation of cities from economically favorable to economically unfavorable situations is not justified. It is not likely that the percentage of population in cities would be appreciably affected, although the cities might be somewhat fewer in number and more populous, for granting the same inertia and business organization, the ratio of urban to rural population depends on the relative profitableness of industrial and agricultural pursuits. At any rate, the policy could be instituted and then if unsocial results should appear, which is unlikely, it could be stopped, and any approximation to more economic conditions would be desirable.

Territorial monopolization is a more difficult way of doing the same thing. Under this plan, the most efficient parts of the system would be used for through traffic and the differential parts for local traffic—precisely what would happen under a system of rates based on the expenses of the supra-marginal road. The difficulties in the way of achieving the monopolization scheme are numerous and obvious. The simpler way is to fix rates directly on costs as determined by the standard roads.

THE INTENSIVE MARGIN

Another phase of the marginal road problem arises in connection with the question of efficient management and wisdom in the choice of locations. This is the intensive margin problem.

If it were possible to work out some scheme of average operating costs, it would be possible to allow for superior managerial ability. But it is not possible, for the complexity of the railway business throws so many considerations into the study that statistics of this sort are unattainable. Within very broad limits, as we pointed out in the discussion of standardized operating costs, such figures are useful, but as a basis for the determination of efficiency in operation they are not, for they cannot be determined within sufficiently fine limits.

Maximum rates allow a certain play for efficiency and differential returns under improved operating conditions. Beyond this efficiency cannot be cared for. However, the in-

vestor is in no position to complain, for there is permitted to him what he could get elsewhere; the management cannot complain, for differences in salaries recognize differences in ability; and the consumer, if all roads are placed on the margin, has no ground for complaint, for marginal roads would determine rates anyway. Consequently, we conclude that it is not vitally necessary to allow for theoretical differences in efficiency.

The scheme of territorial valuation covers the case of superior judgment in the selection of rights of way, and penalizes bad judgment.³ This plan needs some explanation. Suppose railways A, B and C serve two points D and E. And suppose the respective costs of the roads to be \$20,000,000, \$30,000,000 and \$50,000,000, or a total of \$100,000,000. This total would be the basis of rates. Assume 8 per cent to be the fair rate of return, or an annual territorial return of \$800,000. Rates may be adjusted so that A will make \$400,000, or 20 per cent of its cost annually; B, \$200,000, or $6\frac{2}{3}$ per cent of its cost; C, \$200,000, or 4 per cent of its cost. In this manner the road with the superior location would make a comparatively large return to its investment, and the differential roads comparatively small returns. This would allow for superior judgment in selecting locations; more significantly, it would put an end to the building of useless roads between competitive points; and it would have the effect of causing a transfer of capital from the sub-marginal to the supra-marginal road. Thus it would have the same effect that basing rates on the expenses of the most efficient roads would have. The total result would be to localize the less efficient roads. As a method of making the transfer to the cost basis, territorial valuation may be of profound significance.

³ Dunn, S. O., *Railway Efficiency and Advanced Freight Rates* in *Journal of Political Economy*, Feb. 1915, p. 142.

CHAPTER V

THE LEGAL THEORY OF FAIR VALUE

JUDICIAL REVIEW

The first significant fact in the development of the legal theory of fair value is the doctrine of judicial review. A very brief exposition of the leading cases in the growth of the doctrine will serve to give an insight into the legal attitude toward rate regulation.

In the Granger cases, 1876, of which *Munn vs. Illinois* is the best known, the Supreme Court of the United States held that the exercise of the police power in fixing rates was a legislative function and that the determination of reasonableness in rate matters was solely a legislative question. Said Chief Justice Waite, speaking of any public business:

"It is insisted, however, that the owner is entitled to a reasonable compensation for its use even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be reasonable under such circumstances, or perhaps more properly, to fix a maximum beyond which any charge would be unreasonable.... We know this is a power which may be abused, but that is no argument against its existence. For protection against abuses by the legislature the people must resort to the polls, not to the courts."

Passing over minor steps in the development of the doctrine, we come at once to the next major step, the Minnesota Rate case of 1889.² In this case Mr. Justice Blatchford, for the court, said:

"The question of the reasonableness of a rate of charge for transpor-

¹ *Munn vs. Illinois*, 94 U. S. 113.

² *Chicago, Milwaukee & St. Paul Ry. Co. vs. Minnesota*, 134 U. S. 418.

tation, involving, as it does, the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect, of the property itself without due process of law and in violation of the constitution of the United States."

This case, which was decided by a six to three vote, did not involve rates made directly by a legislature, but those made by a commission. It was thought at the time, however, and subsequent development proved the correctness of the contention, that *Munn vs. Illinois* had been reversed. Mr. Justice Bradley, in a dissenting opinion, said:

"The majority say, in effect if not in words, that the final tribunal of arbitrament (in rate matters) is the judiciary. I say it is the legislature. I hold that it is a legislative question, not a judicial one.... It may be that our legislatures are invested with too much power, open as they are to influences so dangerous to individuals, corporations, and societies. But such is the constitution of our republican form of government and we are bound to abide by it until it can be corrected in a legitimate way".

In the short space of thirteen years, the court, in the interpretation of constitutional property guarantees, which in the case amounts to judicial legislation, had put important limitations about the legislative exercise of the police power. No longer must appeal lie to the polls for redress against unreasonable use of the regulatory power. This case marks the turning point in the regulation of rates in this country. By 1898 all dissent to the doctrine of judicial review had disappeared.³

The fundamental idea in the doctrine is, obviously, a prohibition, imposed on the states by the fourteenth amendment to the Federal constitution, against taking property, through

³ A full account of the doctrine may be found in Smalley's *Railroad Rate Control in Publications of the American Economic Association*, Vol. 7, 3rd series, page 422.

rate regulation, without due process of law, or just compensation. Attention may be called to the fact that the fifth amendment to the constitution imposes the same prohibition upon the Federal government.

More specifically, the doctrine of judicial review means judicial power to define the content of property. Property rights are defined in the constitution, and the court, as interpreter of the constitution, must ultimately give meaning to the constitutional pronouncements concerning property. Since valuation is essentially a defining of property rights the courts ultimately control valuations. It matters not how much the result may be affected by what commissions may think, the legal theory of fair value is necessarily controlling in matters of rate regulation. Thus it becomes of vital importance to study the court's position.

THE POLICE POWER AND PROPERTY

We may digress for a moment to point out the nature of the police power and its relation to institutional definition.

In the first place, the police power cares for public welfare. It "aims to secure and promote public welfare."⁴ This assumes a social point of view. "The care of public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about the greatest good to the greatest number."⁵ It is clear then that public policy "assumes the superiority of social over individual welfare."⁶

In the second place, the police power both restrains and compels. It may act, therefore, negatively and positively; destructively and constructively. It may, in other words, restrain discrimination and compel just rates.

In the third place, the police power is a dynamic force. The police power is the "expression of social, economic and political conditions. As long as these conditions continue to

⁴ Freund, E., *The Police Power*, p. 3.

⁵ *Ibid.*, p. 5.

⁶ *Ibid.* p. 11.

change the police power must continue to be elastic, i.e., capable of development.”⁷

Broadly, the police power is the power to determine public policy in the light of changing social, economic and political conditions. It is, therefore, a power of tremendous importance.

There are two general phases of this power, namely, public policy in relation to liberty, and public policy in relation to property. “The maxim of the power is that every individual must submit to such restraint on the exercise of his liberty and of his property as may be required to remove or reduce the abuse of these rights.”⁸ In rate questions we deal only with the latter of these two phases: that of public policy in relation to property.

In *Munn vs. Illinois* the Supreme Court laid down the following fundamental doctrine:

“This brings us to inquire as to the principle upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking then at the common law, from whence comes the right which the constitution protects, we find that when private property is ‘affected with a public interest’ it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*, and has been accepted without objection as an essential element of the law of property ever since. Property does become clothed with a public interest when used in such a manner as to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled for the common good to the extent of the interest he has created.”⁹

This principle is clearly not static. What constitutes “of public consequence” or “a public interest” depends, obviously, on the nature of economic, social, and political relations at any particular time. It is essentially a direct announcement of the fact that property must subserve social interest—that

⁷ Freund, E., *op. cit.*, p. 11.

⁸ *Ibid.*, p. 11.

⁹ *Munn vs. Illinois*. 94 U. S. 113.

the justification of private property rests solely in its social usefulness.¹⁰

The common law doctrine of public interest sprang up in the days of Mercantilism. Under that régime the individual was practically of no importance; the state was supreme. In order to build up a strong state many detailed regulations of individual activities were prevalent. The period of extreme individualism which followed Mercantilism for all practical purposes forgot the doctrine of state superiority, and beneficially so. Individualism in a complex economic régime soon works its own destruction. A new theory of society and of social functions has come into being. The state, in the mercantile sense, is no longer supreme, but social purposes are supreme, and the need for a legal doctrine of social superiority became, during the latter part of the nineteenth century, an absolute necessity. It might have been developed anew, but it was simpler to reach back into the past and pull out of it an old doctrine which could easily be adjusted to new conditions.

Regulation, of course, consists in abstracting certain rights from the private sphere. The residue of rights remains purely private. In other words, private property in certain elements persists and in certain others ceases. It may become proper to increase the sphere of private rights. The process is one of adjustment in order to secure highest economic welfare. In fact in the new development of the doctrine many activities are not regulated that under the older application of it were regulated. The price of bread is no longer ordinarily fixed, although it may be in times of war.

THE CONTENT OF PROPERTY

We have now to inquire into the judicially determined extent of private property public for purposes of rate regulation. We find an answer for the first time in *Reagan v. Farmers' Loan and Trust Co.*, 1894.¹¹ Mr. Justice Brewer, for the court, said:

"The equal protection of the laws—the spirit of common justice—

¹⁰ Ely, R. T., *Property and Contract*. Prof. Ely discusses these points quite fully, especially in Part I, Chapter VII, The Police Power.

¹¹ *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362.

forbids that one class should be by law compelled to suffer that others may make gain. If the states were to seek to acquire title to the roads, under the power of eminent domain, is there any doubt that the constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

This case is often cited as showing that the court, in the first instance, adopted market value as the basis of rates.¹² The truth is that the International and Great Northern, the road involved in the case, has never paid its way. It is one of those unfortunately placed roads where traffic is too light. It is, of course, a misnomer to speak of market value as a basis of rates even in a case of this sort, but to generalize from a specific case of this kind is about as faulty logic as one can conceive. The point of monopoly surplus was not raised in the trial. Moreover, if we look further into the case, we find that the court takes a very different position. Its real position seems to be indicated in the following quotation:

"Is there anything that detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced today for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stocks represent money invested in the construction of the road. The owners of the stock have never received a dollar's worth of dividends in return for their investment . . . the earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in the interest, the stockholders have put their hands in their pockets and advanced over a million of dollars. The officers and employees have been paid no more than is necessary to secure men of the skill and knowledge requisite to the suitable operation of the road . . . Can it be that a tariff which under these circumstances has worked such results (caused further losses) to the parties whose money built the road is other than unjust and unreasonable? Would any investment ever be made of pri-

¹² Whitten, *Valuation of Public Service Corporations*, p. 58.

vate capital in a railroad enterprise with such as the proffered results? There may be circumstances which would justify such a tariff; there may have been waste in the management of the road; enormous salaries, unjust discrimination as between shippers, resulting in a general loss. The construction may have been made at a time when material and labor were at the highest prices, so that the actual cost far exceeds the present value; the road may have been unwisely built in localities where there is not sufficient traffic to sustain a road."¹³

This is evidently a present value, and not a market value, theory. Although not clearly formulated, the essential idea underlying the whole position is a comparative market value or alternative use theory. It is an indistinct announcement of an opportunity cost doctrine. In any event it is not a pure market value theory.

The court did not fall into the circle of market value. To make market value the basis of rates is to deny the validity of rate regulation, for since rates determine income and income determines market value, there would be no measure of market value except the opportunistic principle or practice of what the traffic will bear, or, less euphoniously, monopoly charge. It would then be a foolish waste of time to attempt to find market value in order to fix rates when the rates would have to be left as they were in order to maintain the market value. Even service regulation would be denied, for to increase service requirements would increase expenses and lower net revenues and thus lower market value. This would be confiscation on the assumption that market value controlled.

Precisely the same position is taken in *Smythe v. Ames*, 1898, and the formulation is clearer.

"A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people from unreasonable charges for services rendered by it. It cannot be assumed that any railroad corporation accepting franchises, rights, and privileges at the hands of the public, ever supposed that it ac-

¹³ *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 410.

quired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public service and the people interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. . . . We hold that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters to be considered, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."¹⁴

This is dicta as it was unnecessary to decide the point in this case. The rates were held unreasonable from any point of view, but it will be noted that precisely the same points that are actually considered in the *Reagan* case are mentioned here as controlling elements in fair value. The position of the court is clear. Private property, from the point of rate making, includes only a fair return on the fair value of that used for the public convenience. Private property is thus a right to income, but to no more than a fair income. All income above that which is fair may be taken through rate regulation without violating the prohibition of the fourteenth amendment. As no compensation must be made for taking income above the level of reasonableness, as there is no private claim to such income, private property is limited to a just level. To illustrate: Suppose a corporation expends \$100,000 in a

¹⁴ *Smythe v. Ames*, 169 U. S. 466, 545.

plant which is able, by virtue of monopoly position, to earn \$15,000 a year. The commercial value of the plant, assuming 8 per cent to be the current investment rate, would be in a neighborhood of \$187,500. How much of this is private property? If the court, applying its tests of reasonableness, should decide that \$125,000 was the fair value of the plant and 8 per cent a fair rate of return, the difference between \$187,500 and \$125,000 could be taken without compensation. It is, therefore, not private property. Any taking below this point would be in violation of private property rights and therefore unconstitutional, unless perchance some provision were made for just compensation.

From the point of view of rate regulation, then, private property may be defined as the legal right to a reasonable return on the reasonable value of that which is used for the public convenience. Whether or not this interpretation of the content of property is in accord with economic principles and public policy depends entirely on the meaning given to reasonableness. Consequently, we pass to a discussion of the judicial interpretation of reasonableness.

THE WHOLESOMENESS OF THE DOCTRINE OF JUDICIAL REVIEW

Before passing to the interpretation of reasonableness by the courts we wish to say a word as to the wholesomeness of the doctrine of judicial review. One may agree with those jurists who believe that the doctrine of judicial review is a usurpation of power on the part of the courts,¹⁵ or with those persons who think that the result of the doctrine is privilege made property,¹⁶ or with those who decry the fact that public businesses are in part relieved from the ordinary hazards of business,¹⁷ and therefore condemn the doctrine, and one may not. The last reason is no reason at all; in fact, one is inclined to

¹⁵ See dissenting opinion of Mr. Justice Bradley in the *Minnesota Rate* case. *Supra*, p. 90.

¹⁶ Orton J., *Confusion of Property with Privilege in Independent*, 67: 392, 448.

¹⁷ Smalley, *Railroad Rate Control in Publications of the American Economic Association*. 3rd series, Vol. 7, p. 422.

come to the opposite conclusion. To relieve public businesses of hazards ordinary or extraordinary is highly desirable as a means of approximating investment conditions. Of the jurists who believe in the usurpation idea, few for this reason condemn the doctrine. Those who believe that privilege is made property are clearly looking at a possible use of the power. The truth seems to be about as follows: Public opinion ultimately controls in this country.¹⁸ But public opinion controls the courts from afar off. It is, therefore, a mature public opinion. The fickleness of public opinion is proverbial, and unripened sorts working through unstable legislatures can, and often do, do more industrial harm in a legislative day than can be remedied in a generation.¹⁹ In the present status of political conditions in the country, one must give assent to the wholesomeness of the judicial power of defining the content of property. As a permanent policy we do not discuss it. Probably a commission removed from political influence would be ideal, but this body would be judicial, and we cannot get away from the control of public opinion, even if we would, so we end where we started. It may be that the courts move a little slowly, but better that than the wild speed of legislatures.

¹⁸ Bryce, J., *The American Commonwealth*, Vol. 2, pp. 261-299.

¹⁹ The Potter law of Wisconsin is a good example.

CHAPTER VI

THE LEGAL THEORY OF FAIR VALUE: THE INTER-
PRETATION OF REASONABLENESS

GENERAL TREND OF DECISIONS

An unbroken line of decisions, following the *Reagan* case and *Smythe v. Ames*, has continued the doctrine that present value is the equivalent of fair value. In *San Diego v. National City*, 1899, on appeal, Mr. Justice Harlan refers to "the reasonable value of the property at the time it is being used by the public."¹ In *San Diego v. Jasper*, 1903, Mr. Justice Holmes maintains that present value as a basis of rates is settled law; "this is decided, and is decided against the contention that you are to take actual cost."² In the *Consolidated Gas* case, 1909, Mr. Justice Peckham says: "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding rates.... This, at any rate, is the general rule."³ Finally, in the *Minnesota Rate* case, 1913 the court said:

"The basis of calculation is the fair value of the property used for the convenience of the public. *Smythe v. Ames*, or as it was put in *San Diego v. National City*: 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.' The scope of the inquiry was thus broadly described in *Smythe v. Ames*: 'In order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as com-

¹ 174 U. S. 739.

² 189 U. S. 439.

³ 212 U. S. 19.

pared with the original cost of construction, the probable earning capacity under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."⁴

It is significant to note in *Smythe v. Ames*, "It (a railway) may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon excessive valuation or fictitious capitalization;" in *San Diego v. National City*, "The property may have cost more than it ought to have cost;" in *San Diego v. Jasper*, "The only evidence in favor of a higher valuation is the original cost of the work seemingly inflated by improper charges to that account and by injudicious expenditures;" in *Stanislaus v. San Joaquin*,⁵ "the original cost may have been too great, mistakes of construction, even though honest, may have been made....more property may have been acquired than was necessary or needful for the purpose intended," and finally, in the *Minnesota Rate* case, "it is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than cost.....And where the inquiry is as to the fair value of the property it is not admissible to attribute to the property owned by the carriers a speculative increment in value.... beyond the value of similar property owned by others....That would be to disregard the essential conditions of public use, and to make the public use destructive of public right."⁶

⁴ 230 U. S. 352, 434.

⁵ 192 U. S. 201.

⁶ 230 U. S. 352.

There can be no mistaking the intention of the court to identify present value and fair value. Actual cost or investment, if below or above present value, is specifically ruled out.

This only starts the inquiry, however, for present value may mean any one of several things. Present value may mean, from the cost point of view, (1) the cost of reproducing substantially the existing plant using present prices of labor and materials, (2) the cost of reproducing an equally efficient substitute plant or utilizing new opportunities at present prices, and (3) the cost, at present prices, of reproducing the existing plant under the actual conditions of construction. In every case, the cost of establishing the business may or may not be included. From the value point of view, present value may mean commercial value, *i. e.*, net earnings, as affected by future prospects, capitalized at an assumed rate of capitalization.

As already stated, commercial value is obviously unsound as a basis of rates. The court has never used it. The Reagan case and the mention of market value of stocks and bonds in the case of *Smythe v. Ames*, which clearly relates to the conditions in the *Reagan* case, do not justify the opposite conclusion. Every one recognizes that commercial value depends on rates and that it would be absurd to base rates on such value. One who holds otherwise is in a fair way to solve the problem of perpetual motion, or to raise himself by his own boot straps, the proof of the validity of the proceeding resting in showing the boots.⁷

THE PRINCIPLES UNDERLYING PRESENT VALUE INTERPRETED AS COST OF REPRODUCTION LESS DEPRECIATION

It is ordinarily said that the legal theory of fair value may be summed up in the expression cost-of-reproduction-less-depreciation. This conclusion is, it seems, not entirely true, but it will serve to clear the way for the exposition of the legal theory if the fundamental principles of this position are made clear. From the

⁷ The Washington Railroad Commission has a peculiar notion of a sort of competitive-monopolistic-market value. *Annual Report*, 1907-8, pp. 127-318. See *Census Bulletin* No. 21 for methods of computing commercial value.

Consolidated Gas case, 1909, comes the best statement of this theory. District Judge Hough says:

"As to realty, the values assigned are those of the time of inquiry; not the cost when the land was acquired for the purpose of manufacture, and not the cost to the complainant of so much as it acquired when organized in 1884, as a consolidation of several other gas manufacturing corporations.

"It is objected ~~that~~ such method of appraisement seeks to confer upon the complainant the legal right of earning a fair return upon land values which represent no original investment by it, does not indicate land especially appropriate for the manufacture of gas, and increases the apparent assets without increasing earning power. Analogous questions arise as to plant, mains, services, and meters; the reported values whereof are the reproductive cost less depreciation, and not the original cost to the complainant or its predecessors.

"It appears by undisputed evidence that some of these last items of property cost more than new articles of the same kind would have cost at the time of the inquiry; that some of the designs are not now favored by the scientific and manufacturing world, so that no one now entering upon a similar business would consider it wise to erect such machines or to obtain such apparatus. In every instance, however, the value assigned in the report is what it would cost presently to reproduce each item of property, in its present condition, and capable of giving service neither better nor worse than it now does. As to all the items enumerated, therefore, from real estate to meters, inclusive, the complainant demands a fair return upon the reproductive value thereof, which is the same thing as present value properly considered. To vary the statement: Complainants arrangements for manufacturing and distributing gas are reported to be worth the amounts above tabulated if disposed of (in commercial parlance) 'as they are.'

"Upon authority, I consider this method of valuation correct. What the court should ascertain is the fair value of the property being used. . . . It is impossible to observe the continual use of the present tense in these decisions of the highest court without feeling that the actual or reproductive value at the time of the inquiry is the first and most important figure to be ascertained. . . . Upon reason, it seems clear that in solving this equation plus and minus quantities should be equally considered, and appreciation and depreciation treated alike. . . . The complainant by itself and some of its constituent companies has been continuously engaged in the gas business since 1823. A part of the land in question has been employed in that business for more than two generations, during which time the value of land on Manhattan Island has increased even more rapidly than its population. So likewise the construction expense not only of build-

ings but of pipe systems under streets now consisting of continuous sheets of asphalt over granite, has enormously advanced.

"The value of the investment of any manufacturing plant, factory, or goods, or all three, is what his possessions will sell for upon a fair transfer from a willing vendor to a willing buyer, and it can make no difference that such value is affected by the efforts of himself or others, by whim or fashion, or (what is really the same thing) by the advance of land values in the opinion of the buying public. It is equally immaterial that such value is affected by difficulties of reproduction. If it be true that a pipe line under the New York of 1907 is worth more than a pipe line under the city of 1827, then the owner thereof owns that value, and that such advance arose wholly or partly from difficulties of duplication created by the city itself is a matter of no moment. Indeed, the causes of either appreciation or depreciation are alike unimportant, if the fact of value be conceded or proved; but that ultimate inquiry is often times so difficult that original costs and reasons for changes in values become legitimate subjects for investigation, as checks upon expert estimates or bookkeeping, inaccurate and perhaps intentionally misleading If fifty years ago, by the payment of certain money, one acquired a factory and the land appurtenant thereto, and continues today his original business therein, his investment is the factory and the land, not the money originally paid, and unless his business shows a return equivalent to what land and building, or land alone, would give if devoted to other purposes (having due regard to cost of change) that man is engaged in a losing venture, and is not receiving a fair return from his investment, i. e., the land and building. The so-called 'money value' of real or personal property is but a conveniently short method of expressing present potential usefulness, and investment becomes meaningless if construed to mean what the thing invested in cost generations ago. Property, whether real or personal, is only valuable when useful. Its usefulness depends on the business purposes to which it is or may be applied. Such business is a living thing, and may flourish or wither, appreciate or depreciate; but, whatever happens, its present usefulness, expressed in financial terms, must be its value.

"As applied to a private merchant or manufacturer, the foregoing would seem elementary; but some difference is alleged to exist where the manufacturer transacts his business only by government license—whether called by a franchise or by another name. Such license, however, cannot change an economic law, unless a different rule be prescribed by the terms of the license, which is sometimes done. No such unusual condition exists here, and, in the absence thereof, it is not to be inferred that any American government intended, when granting a franchise, not only to regulate the business transacted thereunder, and reasonably to limit the profits thereof, but to prevent

the valuation of purely private property in the ordinary economic manner, and the property now under consideration is as much the private property of this complainant as are the belongings of any private citizen. Nor can it be inferred that such government intended to deny the application of economic laws to increments earned or unearned, while insisting upon the usual results thereof in the case of equally unearned, and possibly unmerited, depreciation."⁸

This clear statement of the cost-of-reproduction-less-depreciation theory of fair value is made clearer by a quotation concerning the rate of return. In the same case, District Judge Hough says:

"Such business is secured against competition, because the monopoly is beneficial. To have the streets of the borough of Manhattan torn up to afford room (if room exists) for the mains of a rival is unthinkable. For the same reason, and because the population and its wants will increase, so far as human foresight can perceive, the amount of business will increase. So that the inquiry here is: What is a fair and reasonable charge or rate of return upon the most favorably situated gas business in America, not forgetting that all gas businesses are inherently subject to many of the vicissitudes of manufacturing?

"Much testimony has been introduced to show that certain investors in gas works well known throughout the country expect to obtain from 8 per cent to 15 per cent upon the price of what they can buy. It must be admitted that investors are entitled to reap large reward, if they can, from the hazards of a new business, or the rebuilding of a broken one. Such ventures are for exploitation, and the day for exploiting the business of selling illuminating and fuel gas in New York City is past—or certainly ought to be. The exploitation value in this case is represented by the enhancement over cost of land, mains, and services, arising from local conditions beneficial alike to this complainant and many other New Yorkers, who by judgment or luck purchased or constructed, perhaps generations ago, what many men desire. An interest in the gas business of this city is as nearly a conservative investment as any private manufacturing enterprise can furnish, and, although each case depends upon its special facts, there is, after problem conditions are ascertained, one question that can always be asked: What would that prudent man acquainted with business (so familiar to the readers of legal literature) do regarding such investment if it were offered him? I think he would take it, not with enthusiasm, but as fairly safe local property, promising a rate of return sufficiently above the local mortgage rate to compensate for the

⁸ 157 U. S. Fed. 849, 870.

additional and non-insurable risk. He would expect and have just and reasonable right to expect a return of 6 per cent, not because that happens to be the interest rate established by law in the state of New York, but because it is the return ordinarily sought and obtained on investments of that degree of safety in the city of New York."

Fundamentally, this theory is based on the doctrine of opportunity cost interpreted from a private point of view. The two questions asked are (1) what would it presently cost a producer to get into the particular business being valued, and (2) with certain risk adjustments, what return would the producer forego in other fields in making an investment, in the present, in the regulated field? It is clearly a doctrine of present opportunity cost.

Carried to its logical conclusion, this theory would use cost of substitute plant instead of cost of present plant, and would allow intangible items as determined by the comparative method. But the theory is not carried so far. Nevertheless, the theory of the court is clear. If one has \$100,000 to invest and could get 6 per cent in other investments of similar risk he must be allowed 6 per cent in regulated business. If one wanted to get into a particular business he would have to pay for the necessary property its value in other uses. If perchance, A should put \$100,000 into a business, and tomorrow it would cost B \$200,000 to get into the same business then A gets the benefit of the increased cost of production, and gets a price which gives him a return on \$200,000 whereas he put in only \$100,000. This is the position of the court. It assumes a competitive condition and under any other conditions is entirely invalid. Even from a private point of view one cannot justify the application of the doctrine to pavements over mains. This sort of value is altogether hypothetical.

From a social point of view, the theory breaks down in four important respects: (1) it fails to take into account actual outlays for non-physical items, (2) it fails to understand the nature of rent and land value, and permits a double return in that it allows appreciation plus return on appreciation, (3) it capitalizes monopoly position in certain cases, as in the case of pavement over mains, (4) it confuses the appreciation and

depreciation problems, applying the doctrine of offsets, which may practically work out in some cases, but which is theoretically unsound. It deducts depreciation which, unless a fund has been legally required, is not just. The primary error, of course, lies in the failure to distinguish between freely reproducible goods and non-freely reproducible goods, and in carrying a theory which may be sound enough if applied only to freely reproducible goods over into the field of non-freely reproducible goods.

As applied to capital goods, the results correspond, if violently fluctuating prices are eliminated through the use of averages, to the original cost as affected by an index of price changes. As applied to goods which are not freely reproducible, the result is to destroy equal opportunity, for it capitalizes increases in value not commonly appearing in competitive businesses. Thus the fundamental principle in the economical doctrine of fair value is directly opposed in the cost-of-reproduction-less-depreciation theory.

PRINCIPLES UNDERLYING THE LEGAL THEORY OF FAIR VALUE

The general language of the Supreme Court would seem to indicate adherence to the doctrine laid down by District Judge Hough in the *Consolidated Gas* case. Moreover, in this case, on appeal, Mr. Justice Peckham, for the court, said:

“And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This, at any rate, is the general rule.”⁹

And although the decision of the inferior court was upheld, this general concurrence by the Supreme Court does not mean that it sustained the inferior court in all particulars. In fact, in very important points there is a wide divergence in

⁹ 212 U. S. 19, 52.

the positions of the two courts—a divergence so wide as to amount to a difference in fundamental theory.

The differences of which we speak lie in the items legally entering into rates. In the matter of rate return the Supreme Court fully sustains the lower court. Mr. Justice Peckham says:

“There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon the circumstances and the locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there on investments of a similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of somewhat hazardous character is very properly held to have the right to a larger return without legislative interference than can be obtained from an investment in government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain if possible, a much greater return upon his investment than he who invested in such property in the city of New York after the risk and danger involved has been almost eliminated . . . An interest in . . . (this) . . . business is as near safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. . . . Under these circumstances, the court held that a rate which would permit a return of 6 per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in New York.

“Taking all the facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use.”¹⁰

So much for the rate of return; we now take up the differences in the two positions. These lie chiefly in the disposition of

¹⁰ 212 U. S. 19, 48.

intangibles and such hypothetical or artificial values as condemnation multiples and increased value due to pavement over mains.

These latter items are not included in value. In the recent *Minnesota* case, in discussing land value, the highest court said:

"And where the inquiry is as to the fair value of the property . . . it is not admissible to attribute to the property owned by the carriers a speculative increment in value—beyond the value of similar property owned by others.

"The company would certainly have no ground for complaint if it were allowed a value for these lands equal to the fair average market value of similar lands in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowance made below for conjectural cost of acquisition and consequential damages must be disapproved; and in this view we also think it was error to add to the amount taken as the present value of the lands, the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expense,' 'contingencies,' and 'interest during construction.'"¹¹

Thus are condemnation multiples definitely excluded. At least this is true when appreciation covers up these expenses. If it could be shown that the condemnation outlay was real and that appreciation had not covered it, it is probable that the court would allow it, but this point is not decided. In the ordinary case this point would not arise as appreciation has been large enough to cover. Land value is, then, determined by the market value of adjacent lands: a comparative market value doctrine, or an opportunity cost doctrine. The difference between this position and the full application of the cost of reproduction doctrine is obvious.

Although the question of pavement over mains has not been definitely decided by the Supreme Court there is little doubt as to what will be its ultimate decision. In the *Consolidated Gas* case, the lower court, following the cost of reproduction theory to its logical end, allowed this element in valuation. The Supreme Court approved the findings of the lower court without discussing this point. In the *Cedar Rapids Gas* case,

¹¹ 228 U. S. 729, 763.

1909, the Supreme Court of Iowa definitely ruled against any value due to pavements over mains.¹² The Supreme Court of the United States upheld that decision without discussing the point,¹³ and the question is thus not settled. But the artificiality of the item is similar to the artificiality of condemnation multiples. The latter item has been ruled out; the former is of the same nature and will probably meet the same fate.¹⁴

If these conclusions are true, they indicate that present value refers sometimes to cost under actual conditions of construction and sometimes to cost under conditions of reproduction. This means, interpreted in terms of economic theory, that the court has, in some degree, reached the sound position of distinguishing between freely reproducible goods and goods not freely reproducible, and in the case of the latter is passing, in part at least, over to a position which corresponds to original cost as affected by an index of price changes. This distinction may be made unconsciously, but the manifest unjustness of treating these sorts of items as capital goods of the ordinary kind are treated is clear to the court, and with much care it is feeling its way to another position. In other words the court is passing over to a social point of view.

In the matter of intangibles, the *Cedar Rapids Gas* case, 1912, seems to indicate that intangibles are cared for if reproduction value, not salvage value, is taken as the basis of rates. Mr. Justice Holmes says:

"Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. (*Willcox v. Consolidated Gas*, 212 U. S. 19, 52.) An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be

¹² 144 Iowa 426.

¹³ 223 U. S. 655.

¹⁴ In *Des Moines Gas Co. vs. Des Moines*, 35 S. C. R. 811, the Supreme Court (June 1915) expressly ruled out pavement over mains as an expense item. This decision was made after this chapter was written.

got, free from competition, is protected by the fourteenth amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extremes can have been meant."¹⁸

Thus does the court disclaim any sympathy with the going concern theory of intangibles. The circular "cost of creating an income" theory is clearly cast aside. The independent amount, urged by the average defendant of the reproduction method, is not approved. On the other hand, the going value theory is also not endorsed. The actual historical outlays for non-physical items are not considered.

This position is a perfectly logical outcome of the comparative market value theory held by the court. Salvage value is not the basis of rates, but a value determined by the ordinary competitively determined value of output. Machines that cost \$1,000 would ordinarily under the comparative market value theory have a value of \$1,000, although after a few months' use, they would probably not sell for more than a few hundred dollars. It is the comparative cost value that controls. And taking this cost value, in the estimate of the court, allows for value as a going concern. It is clear that after the machine had been used for half its life, under the comparative market value theory, it would have depreciated 50 per cent. That is, it would be capable of turning out only half as much service as when new: not half as much at the particular time, for it might be in a state of high efficiency, but half as much from the life-time point of view. Half its life is gone: it can, therefore, turn out only half as much as a new one, and is therefore only half as valuable.

The intention of the court is clear. The two fundamental doctrines are equal opportunity and opportunity cost. The first means that producers in monopoly fields should have monopoly advantage removed; this places all producers in the same relative position. Monopoly advantage removed, the doctrine of opportunity cost means that a producer in regu-

¹⁸ 223 U. S. 655, 669.

lated fields should be allowed a return equal to what he could get elsewhere on what it would cost him to get into the business. What it would cost him to get into the business is interpreted as present cost sometimes of present plant, and sometimes of actual construction—a historical position.

Of course, the court must accept existing classifications and can have a theory of equal opportunity only as between individuals in a class. The economic theory, which legislatures and commissions can follow effectively, develops a theory of equality as between classes, or rather transcends classes and develops a general theory of equality as between individuals—not of equality of persons, but of equal opportunity to produce.

The comparative market value theory applies, then, only within classes. In this case the class is the producing class, exclusive of labor. Under competitive conditions, the value of goods is determined by the returns which accrue. These returns accrue under conditions of equal opportunity and are, therefore, fair, for there is no coercion, as exists in the case of monopoly. If the same values be attached to goods employed in monopoly business the same returns will accrue to such producers as accrue to other producers and equal treatment is afforded to all in the class. It will be a matter of indifference, theoretically, whether one invests in monopoly or in competitive business.

The legal theory has for its object the attainment of equal opportunity. It approximates the investment theory in applying present prices to freely reproducible goods, and in applying present prices to original construction conditions in the case of some non-freely-reproducible goods. But certain other non-freely-reproducible goods are not so treated, for example, land. The comparative market value theory also fails to handle properly the depreciation problem and the matter of intangibles. These matters we now take up.

COMPARATIVE MARKET VALUE AND DEPRECIATION

Comparative market value as a basis of rates connotes the subtraction of depreciation in all cases. The court faithfully

follows its theory. In the *City of Knoxville vs. Knoxville Water Co.*, 1909, the Supreme Court reversed a decision of the lower court enjoining the enforcement of an ordinance of the city of Knoxville establishing maximum rates for water. The Master below had used cost new as the basis of value. Mr. Justice Moody said: "The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use."¹⁶ Deducting depreciation, value was high enough to permit the accrual of a fair return under the prescribed rates. The same doctrine is sustained in the *Consolidated Gas* case (212 U. S. 19) and in the *Minnesota Rate* case, (228 U. S. 729).

We have already pointed out¹⁷ that in the case of newly regulated companies there is no prima facie evidence that depreciation ought to be deducted. In fact, the weight of evidence is in the other direction. In the case of old regulated companies it is purely a matter of expediency whether or not depreciation funds ought to be required and, therefore, cost new less depreciation become the basis of rates. In any event, the comparative market value theory rests its case on assumptions which are doubtful and not proved.

COMPARATIVE MARKET VALUE AND INTANGIBLES

Intangibles include, from the investment point of view, actual expenditures in establishing a business which are not embodied in physical items. That there are many costs of this sort in the beginning is clear. That they occur at the times of extensions is also clear. The comparative market value theory does not take account of them directly although in allowing a higher rate of return during the earlier years this expense may in fact be amortized and therefore, from the point of view of the investor, justly handled. But if, perchance, this amortization process has not taken place and a valuation is made, it is present risk and present comparative

¹⁶ 212 U. S. 1, 9.

¹⁷ *Supra*, p. 60.

market value that control and no attention is paid to the historical or investment facts. One cannot go far wrong in concluding that such a method is rather unscientific. From the standpoint of justice, it becomes more or less a guess, and guess work is somewhat unstable as a basis of justice.

COMPARATIVE MARKET VALUE AND LAND

Another serious objection to the comparative market value theory lies in its treatment of land. This problem centers in donated lands and in land appreciation, both of which items are, of course, included. From the investment point of view both are excluded. Attention has already been directed to the importance of the problem and to the reasons for holding to the exclusion idea.¹⁸ If the legal position is such that it is impossible to exclude these items, under ordinary police power regulation, some other means must be found for doing it. To this problem we devote the next chapter.

COMPARATIVE MARKET VALUE AND THE MARGINAL ROAD

We must now inquire into the legal theory of rates in relation to the marginal road. Attention has been called to the problem and to the economic solution of it.¹⁹ Rates are based on the cost of the marginal road; they should be based on the cost of the most efficient supra-marginal road. The result of basing rates on the costs of the marginal road is the grossest sort of local discrimination, or destruction of equal opportunity to produce. The discrimination can be eliminated only by changing the basis of rates. If a straight cost basis were used it would eliminate the differential road from competitive traffic, but local traffic, in virtue of raised rates, would furnish sufficient revenue to pay returns on the comparative market value of the roundabout roads. This would certainly avoid any charge of confiscation, and there could then be no legal objection to the change.

It might be, however, that under this adjustment the local

¹⁸ *Supra*, p. 53, *et seq.*

¹⁹ *Supra*, Chapter IV.

traffic would not pay a sufficient return to the roundabout roads. It might even be that local traffic would decline, due to a movement of industry to locations on the standard road. It is probable that, in this case, the change would not avoid the charge of confiscation, and that it would be necessary to make compensation amounting to the difference between present and comparative market value and the value as determined by the amount the local traffic would pay.²⁰ As investment was made under existing conditions it would certainly be just to pay this difference: a sort of just vested right. But, during the gradual change of bases, there would accrue a price determined surplus to the supra-marginal roads which might justly be taken and used to amortize the fall in value of the marginal roads. Since the condition of rates based on the marginal road is economically unjustifiable, it ought to be considered a temporary condition. Following the general position taken in regard to capitalization and amortization, *i. e.*, that permanent investments ought to be capitalized, we hold that the "temporary investment" ought to be amortized during the period covered by the change. Since compensation is offered, there can be no legal objection to this position.

²⁰ Gilmore, E. A., Professor of Constitutional Law in the University of Wisconsin.

CHAPTER VII

FAIR VALUE AND THE LAND PROBLEM

THE SIGNIFICANCE OF THE PROBLEM

Some idea of the importance of the problem of land value in rate making may be had from two cases. In the *Western Advance Rate* case, Commissioner Lane estimated that \$150,000,000 out of a total present value of \$530,000,000 was increase in land value. This is something like 26 per cent of present value, or 53 per cent of actual investment which was estimated at \$258,000,000.¹ In the *Minnesota Rate* case, 1913, the original cost of the Northern Pacific was estimated at \$312,000,000. The cost of reproduction, according to the findings of the special master, was \$452,000,000.² This amount was cut down somewhat by the Supreme Court by the elimination of certain intangibles and overheads. The difference, however, between reproduction cost and original cost, \$140,000,000, represented chiefly the unearned increment and donated lands. This amount is approximately 39 per cent of reproduction value and 45 per cent of actual investment. From the social point of view, the railways, in these two cases, were allowed a return on an increment which is unfair.

There is no reason to believe that these increments will not continue to grow with the increase of population in this country. There may be sectional losses due to the movement of population, but the peculiar limitation of land supply will inevitably result in a large appreciation in value as population grows. To permit this appreciation in rates is, as we have

¹ 20 I. C. C. Reps. 307, 337.

² For this case and many others, see Thelan, Max, *A Just and Scientific Basis for the Establishment of Public Utility Rates with Particular Attention to Land Value* in the Report of the Committee on Railroad Taxes and Plans for Ascertaining Fair Valuation of Railroad Property.

pointed out, to establish conditions of unequal opportunity to produce. There is thus presented an important problem for solution.

SUMMARY OF LEGAL SITUATION

The problem may be approached from two legal points of view. Recently the doctrine of principal and agent has been advanced as the proper legal point of view, in contrast with the present doctrine of regulation under the police power.

Certain lower courts have gone over to the former position. Judge Van Vleet, of the California Supreme Court, in *San Diego Water Company vs. San Diego*, a rate case, says:

"As we have said, it is not the water or the distribution works which the company may be said to own, and the value of which is to be ascertained. They were acquired and contributed for the use of the public; the public may be said to be the real owner and the company only the agent of the public to administer their use."³

Quotations from the decisions of the Federal Supreme Court have been cited to show that this court holds the same doctrine. For instance, Mr. Justice Harlan, in *Smythe vs. Ames*, says: "A railroad company is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state."⁴ This excerpt is supposed to prove that the Supreme Court holds the principal and agent doctrine. Such, however, is not the case. The series of cases, beginning with *Munn vs. Illinois* and running through the *Minnesota Rate* case of 1889, the *Reagan* case, *Smythe vs. Ames*, the *Consolidated Gas* case, and the *Minnesota Rate* case of 1913, considers railway property as private to be regulated under the police power. One need only turn back to chapter six of this monograph and read the quotations from the decisions of the court to be convinced of this fact. The doctrine of comparative market value and risk assumption is entirely incon-

³ 118 Cal. 556, 570.

⁴ 169 U. S. 466, 544.

sistent with the principal and agent notion, for the fundamental rule of agency is that the principal benefits from gains and bears losses if the agent makes reasonable use of judgment.

Undoubtedly, if the principal and agent doctrine were adopted the problem of land value would present no difficulties. Appreciation in land value would then accrue to, and depreciation in land value be borne by, the public.

This is probably the simplest solution of the land problem, but it is not the only solution, nor is there as yet any indication that the highest court will ever adopt this view. Its present rulings are quite of another tenor. Certainly, the change will not come until enormous increments have accrued to the railways.

We are forced, then, to seek a solution under police power regulation. The solution here rests in the application of the investment theory of valuation, which would permit the companies to earn a fair return to actual investment and would eliminate the increments. But the court will have to modify its present position greatly before this can be done, and there is little reason to believe that it will. The court's conception of its duty to protect private property rights leads it to the comparative market value theory.

A constitutional amendment would solve the difficulty, but constitutional amendments are notoriously slow in coming. If the court persists in holding the comparative market value theory, the solution must come from that point of view.

PUBLIC OWNERSHIP OF PUBLIC UTILITY LANDS

From the point of view of comparative market value, the only solution seems to be the public ownership of public utility lands. In the case of street railways most of the land used is public highway. The appreciation of adjoining lands has never been used as an argument for advancing rates. In fact, the appreciation of adjacent lands, since it results from increasing population and since street railway businesses are usually subject to the law of increasing returns, is ordinarily co-existent with a possibility of lowering rates. In the case of interurbans and steam roads land is privately owned, and appreciation in

land value is, therefore, usually a ground for raising rates. The increase in population, and the consequent rise of land value, it seems then, affect the rate question in widely different ways.

In view of the legal situation, the logical way out of this difficulty is to extend the principle of the public highway to all lands actually used by a public service corporation in rendering public service.

The elimination of appreciation, donated lands and the speculative element in land value from rates are obvious advantages. The two chief arguments against public ownership are: first, that it would have a deleterious effect on private initiative, and second, that it would result in a powerful political machine. These two arguments do not apply here.

First as to the effect on private initiative. It is not now appreciably discoverable that private initiative is inactive in those public utilities which make large use of public highways. Nevertheless, it will be thought by some that this would not be true in the case of railways. This is a matter chiefly of business custom, but custom is powerful and we hesitate to make changes in face of it. It is customary for steam roads to own their rights of way and terminals, and we come to believe this an essential part of the business. It is not customary for street railways to own their rights of way, and we come to believe this an exception and that private ownership is not essential to them. But the various kinds of public utilities are not vitally different in the nature of their dependence on land. Promoters and investors are quite eager to secure franchises to operate over city streets, even in the face of regulation which does not allow more than a fair return on the capital invested. We see no good reason why steam roads should not operate under the same conditions. Just why a street car company is willing to operate in a city without owning its right of way, and why the same company would not operate between two cities unless it did own its right of way, is not clear. Nor is it clear why steam roads, operating in and between cities, would wither and die if they ceased to own their rights of way. There may be a corporate psychology, but, if so, it is likely that its origin and nourishment are found in custom.

There is another phase of the private initiative question. It must be evident that the sure result of including land appreciation in valuations is a growing agitation for complete ownership and operation by the state of all the big utilities of the country. Commissioner Lane, in speaking of this point in the *Western Advance Rate* case, 1911, says:

"If the position of the Burlington is sound and is a precise expression of what our courts will hold to be law, then there is certainly danger that we never expect railroad rates to be lower than at present. On the contrary, there is the unwelcome promise . . . that they will continuously advance. In the face of such an economic philosophy, if stable and equitable rates are to be maintained, the suggestion has been made that it would be wise for the government to protect its people by taking to itself the property at present values rather than wait the day, perhaps 30 to 50 years hence, when they will have multiplied in value ten or twenty-fold."⁵

To remove land from rates, then, would be one way of prolonging the life of private initiative. The proposal ought, therefore, to appeal in logic to those persons who believe in the superior efficacy of this force in business. On the other hand, if private initiative should prove ineffectual in the management of the railways, and government ownership should become necessary and feasible, the accomplishment of this scheme would be a preliminary work of large import. None but the shallow propagandist can object on the ground that it would lessen agitation. Paradoxical as it may seem, to assume public ownership of the land of railways is a means by which complete ownership may be the more easily effected should it eventually prove desirable, and a means by which it may be avoided if private enterprise is in reality the more efficient force for running public utilities.

The other objection to public ownership is political patronage. To own the railways may be to build a political machine, it may result in the substitution of political competition for economic competition in choosing railway officials, and thus diminish efficiency. To own the lands of railways can have

⁵ 20 I. C. C. Reps. 307, 337.

no such effect, for it does not carry with it any appointive power.

PURCHASE VALUE

It will be asked, What value of land is to be used in carrying out the proposal? The answer is present value. Past inequalities can hardly be remedied without creating others equally inequitable, nor would any other value be constitutional, for to make the plan retroactive would be to take property without due process of law.

REFERENCES

CASES CITED

- Cedar Rapids Gas case*, 144 Iowa 426. Appealed 223 U. S. 655.
Chicago, Milwaukee & St. Paul v. Minnesota, 134 U. S. 418.
Consolidated Gas case, 157 Fed. 849. Appealed 212 U. S. 19.
Des Moines Gas Co. v. Des Moines, 35 S. C. R. 811.
Hill v. Antigo, 3 W. R. C. R. 623.
In re Advance Rate cases, I. C. C. 1911.
In re Application of the La Crosse Gas & Electric Co., 8 W. R. C. R. 138.
Knoxville v. Knoxville Water Co., 212 U. S. 1.
Minnesota Rate case, 230 U. S. 352.
Munn v. Illinois, 94 U. S. 113.
Queens Borough Gas & Electric Light Co. case, 2 P. S. C. 1st N. Y.
Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362.
San Diego v. National City, 174 U. S. 739.
San Diego v. Jasper, 189 U. S. 439.
San Diego Water Co. v. San Diego, 118 Cal. 556.
Smythe v. Ames, 169 U. S. 466.
Spokane v. Northern Pacific, 15 L. C. C. R. 376.
Spring Valley Water Co. v. San Francisco, 165 Fed. 667.
Stanislaus v. San Joaquin, 192 U. S. 201.
State Journal Printing Co. v. Madison Gas & Electric Co., 4 W. R. C. R. 501.
Steenerson v. Great Northern, 72 N. W. 713.
Western Advance Rates cases, 20 I. C. C. R. 307.

GENERAL WORKS

- Bryce, J. *The American Commonwealth*.
 Ely, R. T. *Property and Contract*.
 Ely, R. T. *Outlines of Economics*. 1915 edition.

Freund, E. *The Police Power.*

Johnson, E. R. *American Railway Transportation.*

Whitten, R. H. *Valuation of Public Service Corporations.*

ARTICLES, REPORTS, ETC.

Allison, J. E. *The Rate of Return in Annals of the American Academy of Political and Social Science.* Vol. 53.

Alvord, J. W. *Proceedings of the American Water Works Association.* 1909.

Census Bulletin No. 21. *Methods of Computing Commercial Value.*

Cunningham, W. J. *Scientific Management in the Operation of Railroads in Quarterly Journal of Economics.* Vol. 25.

Dunn, S. O. *Railway Efficiency and Advanced Freight Rates in Journal of Political Economy.* February, 1915.

Eaton, J. S. *Education for Efficiency in the Railroad Service.* (U. S. Bureau of Education Bulletin), 1909.

Erickson, H. *Going Value.* Madison. 1914.

Hadley, A. T. *Constitutional Position of Property in America in Independent.* Vol. 64.

Haney, L. H. *The Social Point of View in Economics in Quarterly Journal of Economics.* November, 1913.

Interstate Commerce Act.

Orton, J. *Confusion of Property with Privilege in Independent.* Vol. 67.

Riggs, H. E. *Proceedings of the American Society of Civil Engineers.* November, 1910.

Report: Directors of the American Telephone and Telegraph Co. March 20, 1912.

Report: National Association of Railway Commissioners. 1910.

Report: St. Louis Public Service Commission on the United Railways of St. Louis, Appendix A.

Sherman Anti-trust Law.

Smalley. *Railroad Rate Control.* (Publications of the American Economic Association) 3rd series. Vol. 7.

Thelan, M. A. *Just and Scientific Basis for the Establishment of Public Utility Rates, with Particular Attention to Land Values.* (Report of the Committee on Railroad Taxes and Plans for Ascertaining Fair Valuation of Railroad Property).

Washington Railroad Commission. *Annual Report.* 1907-8.

Young, A. A. *Depreciation in Quarterly Journal of Economics.* Vol. 28.

Young, A. A., and Davis. *Controversy Concerning Depreciation in Quarterly Journal of Economics.* Vol. 29.



